UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NUMBER: 92-2263

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the city of New York, on the 25th day of February one thousand nine hundred and ninety three.

ANGEL CLAUDIO,

Petitioner-Appellant,

—v—

CHARLES SCULLY, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Respondent-Appellee, Charles Scully, Superintendent, Greenhaven Correctional Facility,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
By:

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Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 205—August Term, 1992

(Argued October 22, 1992 Decided December 28, 1992)

Docket No. 92-2263

ANGEL CLAUDIO,

Petitioner-Appellant,

—v.—

CHARLES SCULLY, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

Before:

OAKES, NEWMAN and PIERCE,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge*, denying a petition for a writ of habeas corpus that alleged that petitioner's Sixth

Amendment right to counsel was violated by his attorney's failure to raise an ineffective assistance of counsel claim under the New York Constitution during a pre-trial appeal to the New York Court of Appeals.

Reversed. Judge Newman dissents with a separate opinion.

WILLIAM E. HELLERSTEIN, New York, NY (Proskauer Rose Goetz & Mendelsohn, of counsel), *for Petitioner-Appellant*.

JOHN M. CASTELLANO, Assistant District Attorney, Queens County, Kew Gardens, NY (Richard A. Brown, District Attorney, Tammy J. Smiley, Assistant District Attorney, of counsel), *for Respondent-Appellee*.

OAKES, *Circuit Judge*:

Angel Claudio appeals from a judgment of the United States District Court for the Eastern District of New York, Edward R. Korman, *Judge*, denying a petition for a writ of habeas corpus. The district court determined that Claudio's Sixth Amendment right to counsel was not violated by his attorney's failure to raise an ineffective assistance of counsel claim under the New York Constitution during a pre-trial appeal to the New York Court of Appeals. For the reasons set forth below, we reverse, with directions. There was a reasonable probability that the neglected claim would have succeeded on appeal and counsel's fail-

ure to raise the claim fell outside the range of reasonably competent assistance.

BACKGROUND

On May 15, 1980, at approximately 4:15 a.m., Steven Zweikert was shot to death during a robbery as he returned home from his high school prom. Four days later, as a result of an anonymous tip, police investigating the incident went to Claudio's home and asked that he accompany them to the police station for questioning. Claudio, who was sixteen years old, complied after his stepmother agreed to accompany him. At the station, Claudio told the police that he had been on his front stoop the night of the incident and had gone to bed around midnight. Claudio allowed himself to be photographed and was then taken home by the police.

On May 21, 1980, Claudio, and his cousin, David Erasquine, consulted the phone book to find legal help. They called the firm of Heller and Heller and left a message. Mark Heller returned their call and agreed to meet with them the next day in Brooklyn Criminal Court, where Heller had some business. As agreed, Heller met with Claudio and Erasquine and talked about Claudio's situation. Heller requested and received one dollar as a token retainer and explained that his fee would be approximately $5,000.

Heller then drove Claudio and his cousin to the Queens County District Attorney's Office in order for Claudio to surrender. Although there is conflicting testimony as to the circumstances surrounding this decision, Justice Kenneth Browne of the New York Supreme Court, Queens County, found Claudio's testimony to be more credible

than Heller's. The findings were that Heller told Claudio to surrender and did not explain the seriousness of the charges that Claudio might face or his available defenses. The judge believed Claudio's testimony that he was told by Heller that, if he surrendered, he might receive probation and serve no jail time at all.

At the District Attorney's office, Heller, having left Claudio and Erasquine in a downstairs hallway, met with District Attorney Santucci and was told that there would be no plea bargain even if Claudio confessed. Heller did not share this information with Claudio but simply told him that he was still negotiating. After Heller's meeting with Santucci, Heller was approached by Assistant District Attorney Del Vecchio, who requested that Claudio give a statement. Heller, at first, refused, saying that they should "[j]ust book him and arraign him." Del Vecchio replied, "I want to talk to him, we can't book him and arraign him on nothing." Indeed, Santucci, Del Vecchio, and the other assistant district attorneys testified that without a confession, they had lacked sufficient evidence to charge Claudio with the Zweikert murder.

On Heller's recommendation, Claudio eventually gave his statement, confessing to the Zweikert murder. Heller actively participated in the questioning and in the District Attorney's press conference that was held afterward.

Claudio was indicted for the crimes of murder in the second degree, attempted robbery in the first degree, and criminal possession of a weapon in the second degree. Following the indictment, the court appointed Albert A. Gaudelli to represent Claudio. Justice Browne held the pre-trial evidentiary hearing alluded to above and granted Claudio's motion to suppress his confession on the ground that his Sixth Amendment right to effective assistance of

counsel had been violated by attorney Heller's conduct. The prosecution appealed the court's decision on the pretrial motion, pursuant to New York Criminal Procedural Law § 450.20(8), and the Appellate Division reversed. *People v. Claudio*, 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dept. 1982). The Appellate Division determined that Claudio's right to counsel under the Sixth Amendment of the United States Constitution had not attached because adversarial judicial criminal proceedings had not commenced, citing *United States v. Zazzara*, 626 F.2d 135 (9th Cir. 1980) and *Brown v. United States*, 551 F.2d 619 (5th Cir. 1977). *Claudio*, 85 A.D.2d at 252, 447 N.Y.S2d at 977.

Of particular importance to this case, the Appellate Division also addressed, *sua sponte*, the question whether Claudio's right to counsel had been violated under art. I, § 6 of the New York Constitution.[1] The court found that Claudio's right to counsel had attached according to a line of New York cases that "grew out of the need to protect suspects from prearraignment and preindictment police abuse." *Claudio*, 85 A.D. at 254, 447 N.Y.S.2d at 979. One of these cases, *People v. Skinner*, 52 N.Y.2d 24, 436 N.Y.S.2d 207, 417 N.E.2d 501 (1980), served as the primary basis for the *Claudio* court's finding. According to the *Claudio* court, *Skinner* stood for the proposition that "a person not yet in custody may not be questioned outside of the presence of his attorney about a matter under investigation when the interrogators know that he has

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1 Art. 1, § 6 provides in pertinent part:

> In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him.

N.Y. Const., Art. 1, § 6 (McKinney 1982).

retained an attorney to represent him in relation to the very subject being investigated." *Claudio*, 85 A.D. at 255, 447 N.Y.S.2d at 979. The *Claudio* court applied the *Skinner* rule to the facts of this case and determined that it was "clear that Claudio's right to counsel under [the New York] State Constitution had attached prior to his confession." *Id.* at 256, 447 N.Y.S.2d at 979.

However, the court decided that Claudio's constitutional rights had not been violated since the state constitutional right to counsel before the initiation of formal proceedings did not include a right to effective counsel. In reaching this conclusion, the *Claudio* court focussed exclusively on whether the police and prosecutors had a duty to determine if Claudio had received competent legal help before they questioned him. The court reasoned that it would be impractical and improper to require a law enforcement officer to judge the competency of legal advice, and, therefore, that Claudio did not have a meritorious claim under the New York Constitution. *Claudio*, 85 A.D.2d at 260, 447 N.Y.S.2d at 981.

On appeal, the Court of Appeals affirmed the Appellate Division's decision that Claudio's Sixth Amendment right to counsel had not attached prior to his confession. *People v. Claudio*, 59 N.Y.2d 556, 466 N.Y.S.2d 271, 453 N.E.2d 500 (1983). Claudio's counsel did not raise the Article 1, § 6 New York right to counsel claim on appeal even though it was the subject of lengthy discussion by the Appellate Division and had been argued and briefed by the state. As a result, the Court of Appeals did not reach the issue.[2]

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2 The court stated:

> Defendant asserts only a violation of the Sixth Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment. Defendant does not claim before this court, nor

Following the appeal, Claudio was tried before a jury, convicted on all the charges, and sentenced to a total of 35 years to life imprisonment. The conviction was affirmed by the Appellate Division, but the sentence was modified to 25 years to life. *People v. Claudio*, 130 A.D.2d 759, 515 N.Y.S.2d 845 (2d Dept. 1987). Leave to appeal to the Court of Appeals was denied. *People v. Claudio*, 70 N.Y.2d 873, 523 N.Y.S.2d 501, 518 N.E.2d 12 (1987).

On October 13, 1989, Claudio filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of New York. The petition raised four issues, the first three of which are set out here as they are the same issues Claudio raises on appeal. First, Claudio contended that his Sixth Amendment right to counsel was violated when Attorney Gaudelli failed to raise the Article 1, § 6 ineffective assistance of counsel claim during his pre-trial appeal to the New York Court of Appeals. Second, Claudio asserted that Heller's conduct constituted a violation of his Sixth Amendment right to counsel. Third, Claudio argued that his Sixth Amendment right to compulsory process was violated by the trial court's decision not to allow him to examine District Attorney Santucci during trial.

The district court denied Claudio's petition on April 3, 1992 and issued a corrected memorandum and order granting a certificate of probable cause on April 30, 1992.

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did he do so at the suppression hearing or before the Appellate Division, that his right to counsel under the State Constitution has been violated. Therefore, this court has no occasion to consider the application of the State Constitution to defendant's situation.

Claudio, 59 N.Y.2d at 560 n.1, 466 N.Y.S.2d at 272 n.1, 453 N.E.2d at 501 n.1 (1983).

Claudio v. Scully, 791 F. Supp. 985 (E.D.N.Y. 1992). First, the court determined that Claudio had not been prejudiced by his counsel's failure to raise the Article 1, § 6 claim because there was no reasonable probability that the argument would have succeeded. Second, the court found that Claudio had no Sixth Amendment claim based on Heller's advice prior to his confession because the right to counsel under the United States Constitution had not attached. Finally, the court decided that the refusal to allow Claudio to call Santucci as a witness was not a violation of the Compulsory Process Clause because Santucci's testimony would have been repetitive.

On this appeal, we reverse the district court on Claudio's first claim and affirm the district court's findings on the second and third claim.

DISCUSSION

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel." The right to counsel protected by the Sixth Amendment "is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). On appeal, Claudio argues that his right to effective assistance of counsel was violated on two separate occasions: first, by Heller's ineffective representation prior to his confession and, second, by Gaudelli's ineffective pre-trial representation before the Court of Appeals.

As a threshold matter, we must determine whether Claudio had a constitutional right to counsel at the relevant times during which he was represented by Heller and

Gaudelli.[3] A defendant cannot prevail on an ineffective assistance of counsel claim when the constitutional right to counsel has not attached. *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). Claudio's ineffective assistance of counsel claim concerning Heller's representation fails to meet this threshold requirement. The Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated . . . ." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Despite the clear consensus among every court that has reviewed this case that Heller's conduct was egregious, formal proceedings had not commenced when Claudio confessed and, this claim, therefore, must be rejected.

Unlike Claudio's claim concerning Heller's pre-confession representation, the claim based on Gaudelli's representation does meet this threshold requirement. Clearly, formal proceedings had commenced against Claudio at the time of the pre-trial appeal. Our inquiry, however, does not end there. Although formal proceedings are a necessary condition for the attachment of the Sixth Amendment right to counsel, they are not sufficient. A defendant is not constitutionally entitled to the assistance of counsel in all pre-trial circumstances but only those considered "critical stages" in the proceedings. *See United States v. Wade*, 388 U.S. 218, 227 (1967); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *see also Hamilton v. Alabama*, 368 U.S. 52,

3 Claudio argues that respondents waived the issue of whether there is a right to counsel for pre-trial appeals by not raising the question before the district court. We disagree and reach the merits of the issue. The cases cited by Claudio for his waiver proposition are distinguishable as they involve new claims rather than an additional argument relating to a point already under dispute. *See Kraebel v. Dep't of Hous. Preservation & Dev.*, 959 F.2d 395 (2d Cir. 1992) *cert. denied*, 61 U.S.L.W. 3284 (U.S. 1992); *Grace Towers Tenants Ass'n v. Grace Hous. Dev. Fund Co.*, 538 F.2d 491 (2d Cir. 1976); *First Nat'l Bank of Cincinnati v. Pepper*, 454 F.2d 626 (2d Cir. 1972).

54 ("critical stage" defined as a proceeding which may affect the whole trial).

Claudio's pre-trial appeal to the Court of Appeals was unquestionably a critical stage. District Attorney Santucci and the assistant district attorneys involved in this case have all testified that Claudio's confession was essential to the prosecution's case. In fact, under § 450.50 of the New York Criminal Procedure Law, the prosecution had to certify that the confession was critical to their case and that the case could not proceed without it before they could make a pre-trial appeal of Justice Browne's suppression order.[4]

The Supreme Court in *Ross v. Moffitt*, 417 U.S. 600 (1974), provides additional support for our determination that Claudio's right to counsel had attached at the time of his pre-trial appeal. The *Ross* Court compared the trial stage to the post-conviction appellate process, and decided not to extend the right to counsel to post-conviction discretionary appeals. The Court wrote that:

> it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on

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4 Section 450.50 provides in pertinent part:

> In taking an appeal, pursuant to subdivision eight of section 450.20, to an intermediate appellate court from an order of a criminal court suppressing evidence, the people must file . . . a statement asserting that the deprivation of the use of the evidence ordered suppressed has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in the court either (a) insufficient as a matter of law, or (b) so weak in its entirety that any reasonable possibility of prosecuting such charge to a conviction has been effectively destroyed.

N.Y. Crim. Proc. Law § 450.50 (McKinney 1983).

> appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.

Id. at 610-11. Here, Claudio needed Gaudelli's assistance as a shield, not a sword. The prosecution initiated the appellate process at a time when Claudio's presumption of innocence remained intact.

Having determined that Claudio's right to counsel had attached at the time of his pre-trial appeal, we must still resolve whether Gaudelli's representation was constitutionally defective. A defendant is denied his federal constitutional right to the effective assistance of counsel when his attorney's conduct falls outside the wide range of "professionally competent assistance" and when there is a "reasonable probability" that, but for counsel's inadequate representation, the result of the proceeding would have been different.[5] *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). Although *Strickland* addressed the constitutional standard for ineffective assistance of counsel in the trial counsel context, our Circuit has also adopted the *Strickland* two-prong test in assessing the effectiveness of appellate counsel. *Abdurrahman v. Hen-*

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5 The federal constitutional right to effective assistance of counsel may be violated by an attorney's failure to raise a meritorious state law claim or defense. *See Miller v. Keeney*, 882 F.2d 1428, 1435 (9th Cir. 1989) (counsel not ineffective for omitting meritless state constitutional claim); *Parton v. Wyrick*, 704 F.2d 415, 416-17 (8th Cir. 1983) (counsel not ineffective for omitting meritless state law claim); *Nero v. Blackburn*, 597 F.2d 991, 993-94 (5th Cir. 1979) (counsel ineffective for omitting meritorious state law claim); *Lafosse v. Walters*, 585 F. Supp. 1209, 1212-13 (S.D.N.Y. 1984) (counsel ineffective for filing *Anders* brief where non-frivolous claims, including state law claims, available); *cf. McLeod v. Dugger*, 735 F. Supp. 1011, 1014-15 (M.D. Fla. 1990) (prejudice arising from failure to raise venue claim on appeal evaluated according to state law).

derson, 897 F.2d 71, 74 (2d Cir. 1990). We begin first with the issue upon which the district court denied Claudio's claim, the issue whether there was a "reasonable probability"[6] that an Article 1, § 6 claim would have been successful before the New York Court of Appeals.[7]

New York constitutional law has been enormously supportive of right to counsel claims such as Claudio's. The New York Court of Appeals has consistently interpreted the right to counsel under the New York Constitution more broadly than the Supreme Court has interpreted the federal right to counsel. As the Court of Appeals declared, "[s]o valued is the right to counsel in this State, it has developed independent of its Federal counterpart. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal—well before certain Federal rights were recognized." *People v. Settles*, 46 N.Y.2d 154, 161, 412 N.Y.S.2d 874, 877, 385 N.E.2d 612, 615 (1978) (citations omitted).

Claudio's Article 1, § 6 claim had a reasonable probability of success despite the Appellate Division's decision to deny the claim. Interpreting a line of cases that culminated in *People v. Skinner*, the Appellate Division

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6 In this context, "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694.

7 Respondents also argue that the Court of Appeals was procedurally barred from reaching the state constitutional claim because it was not the basis for the trial court's suppression order. This claim is undermined by the Appellate Division's decision to reach the state issue and respondent's own brief which argued the merits of the state claim before the Court of Appeals. Furthermore, the cases cited by respondents are distinguishable from the case before the court as they do not involve claims that are strongly related and based on the same set of facts. *See People v. Karp*, 76 N.Y.2d 1006, 565 N.Y.S.2d 751, 566 N.E.2d 1156 (1990); *People v. Goodfriend*, 64 N.Y.2d 695, 485 N.Y.S.2d 519, 474 N.E.2d 1187 (1984).

found that Claudio's state constitutional right to counsel had attached but the right was not violated because it did not include a *right to effective assistance of counsel*. We have serious doubts as to whether this is a correct interpretation of New York constitutional law. In particular, the Appellate Division's distinction between the right to counsel and the right to effective counsel has no basis in *Skinner* or other cases interpreting the New York Constitution.

The *Skinner* court extended the reach of the New York Constitution's right to counsel to situations where a person is not in custody but has retained counsel as a result of police investigation. As the court stated:

> In retaining an attorney specifically in response to repeated police-initiated contacts, defendant unequivocally indicated that he felt himself unable to deal with the authorities without legal assistance. In a real sense, he had activated his constitutional right to interpose an attorney between himself and the overwhelming power of the State.

Skinner, 52 N.Y.2d at 31-32, 436 N.Y.S.2d at 211, 417 N.E.2d at 505. The right to effective assistance of counsel appears to be at the heart of the *Skinner* court's decision to adopt a more expansive reading of the right to counsel. The court stated that its rule "simply recognizes the right and need of an individual to have a *competent* advocate at his or her side in dealing with the State." *Id.* at 29, 436 N.Y.S.2d at 209, 417 N.E.2d at 503 (emphasis added).

Similarly, the district court decision that there was no reasonable probability of success on appeal for Claudio's Article 1, § 6 claim is not supported by New York constitutional law. In reaching its decision, the district court

relied almost exclusively on *People v. Beam*, 57 N.Y.2d 241, 455 N.Y.S.2d 575, 441 N.E.2d 1093 (1982), "the only Court of Appeals case dealing with effectiveness of attorney advice in such preliminary encounters with law enforcement." *Claudio*, 791 F. Supp. at 990.[8] *Beam* provides no better basis for the district court's finding that there was no reasonable probability of success than *Skinner*.

In *Beam*, the Court of Appeals considered the case of a defendant who had misinformed his attorney about the incident for which the police wanted to question him. Based on this misinformation, the attorney advised his client to talk with the police. The police knew he had an attorney, but reasonably concluded that he had waived his right to have counsel present during the questioning on the advice of his attorney and then had waived his right against compelled self-incrimination. The *Beam* court held that there is "no obligation on the part of the police to seek some form of independent assurance that the decision of the suspect and his attorney to waive the suspect's right to remain silent . . . is good advice" and "[w]hen a person has had the benefit of counsel and then chooses to waive one of his rights, the police are not required to question the validity of that decision as long as they are assured that the decision was made in consultation with the suspect's attorney." *Beam*, 57 N.Y.2d at 253-54, 455 N.Y.S.2d at 581-82, 441 N.E.2d at 1099-1100.

The district court interpreted *Beam* to stand for a far broader proposition than is merited. *Beam*, as applied to this case, stands for the proposition that the police and prosecutors did not have a duty to question whether Clau-

8 *Beam* was decided on October 19, 1982, after the *Claudio* Appellate Division decision, which was decided on March 15, 1982, and before the *Claudio* Court of Appeals decision, which was decided on July 7, 1983.

dio received competent advice from counsel before confessing. The *Beam* court, however, never reached the issue whether bad advice could serve as the basis for an Article 1, § 6 challenge in a preliminary encounter with the police. The issue was not addressed because counsel's advice in *Beam* was based on false information from his client and, given the context, the advice was not clearly wrong. As the *Beam* court noted, "there are occasions when the best counsel will lead a suspect to waive one of his rights." *Id.* at 254, 455 N.Y.S.2d at 582, 441 N.E.2d at 1099.

Both the Appellate Division decision and the district court's reliance on *Beam* confuse the right to the effective assistance of counsel with the obligation of the State, in certain circumstances, to detect ineffective assistance. The dissent in the *Claudio* Court of Appeals decision emphasizes this problem.[9] As stated earlier, neither the majority nor dissent reached the Article I, § 6 claim, or discussed *Beam*, because Claudio's counsel did not raise the issue on appeal. Nevertheless, Judge Hugh Jones, in dissent, pointed out a serious fallacy in the Appellate Division's reasoning. *People v. Claudio*, 59 N.Y.2d 563, 466 N.Y.S.2d 274, 453 N.E.2d 503 (1983). Judge Jones wrote:

> Although it is true that the court, and perhaps the prosecutor in extreme instances, has the obligation to protect the defendant from representation by his counsel which is perceived at the time to be incompetent, the constitutional right to representation by competent counsel is self-standing, to be protected independent of misconduct on the part of the People.

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9 It deserves mention that the two judges on the Court of Appeals who dissented in *Claudio* were in the majority in *Beam*.

Id. at 566, 466 N.Y.S.2d at 276, 453 N.E.2d at 505 (citation omitted); *see also id.* at 567 n.4, 466 N.Y.S.2d at 276 n.4, 453 N.E.2d at 506 n.4. Judge Jones' criticism of the Appellate Division is equally applicable to the district court's use of *Beam*. The district court mistakenly focussed on the state's obligation to determine the effectiveness of Claudio's counsel rather than Claudio's right to effective assistance of counsel.

The New York courts' treatment of state constitutional right to counsel claims, as seen in cases such as *People v. Skinner*, lends powerful support to Claudio's position that a state constitutional right to effective assistance of counsel begins once counsel has been retained in response to a police investigation. The Appellate Division's initial finding that Claudio's right to counsel had attached at the time Claudio retained Heller lends yet more credibility to this theory. Thus, we find that there was a reasonable probability that an Article 1, § 6 claim would have succeeded before the Court of Appeals.

Claudio meets the second requirement for an ineffective assistance of counsel claim as well. Gaudelli's failure to raise the state constitutional claim fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. No reasonably competent attorney should have missed the Article 1, § 6 claim, even though the Appellate Division ultimately rejected it. The Appellate Division raised the claim *sua sponte*, conceded the important issue that the right to counsel had attached, and addressed more attention to the state constitutional claim than it did to the federal issue. Moreover, as is discussed above, the Court of Appeals had an extraordinary history of broad readings of the right to counsel under the state constitution. Gaudelli's decision not to raise the claim cannot be viewed reasonably as a strategic decision. *Cf.*

Jones v. Barnes, 463 U.S. 745, 753 (1983) ("A brief that raises every colorable issue runs the risk of burying good arguments"). In fact, Gaudelli's brief to the Court of Appeals was nearly identical to the brief he submitted to the Appellate Division, and contained no new information or arguments to refute the Appellate Division decision. Thus, we find that, in light of all the circumstances, Gaudelli's representation of Claudio was professionally unreasonable and constitutionally defective.

Finally, we reach Claudio's third argument that his Sixth Amendment right to compulsory process was violated because the trial judge, Justice Agresta, refused to allow him to call District Attorney Santucci as a witness. Claudio maintains that Santucci's testimony concerning his conversations with Heller prior to the confession was relevant to the question whether Heller's undue pressure rendered the confession involuntary under New York law. *See* N.Y. Crim. Proc. Law § 60.45 (McKinney 1992). We do not believe that Claudio's right to compulsory process was violated. We are not persuaded that the testimony of Santucci would materially differ from that which Claudio had the opportunity to elicit from the assistant district attorney who was in the office when the conversation between the District Attorney and Heller took place. Thus, Santucci's testimony was neither material nor vital to his defense. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *United States v. Biaggi*, 705 F. Supp. 848, 849 (S.D.N.Y. 1988).

CONCLUSION

Accordingly, the judgment of the district court is reversed, and the case is remanded with directions to grant the petition, unless the state affords Claudio an

opportunity to present the Article 1, § 6 state law claim to the New York Court of Appeals within sixty days from the date of our mandate.

JON O. NEWMAN, *Circuit Judge*, dissenting:

The majority has ruled that a lawyer fails to render the effective assistance of counsel guaranteed by the United States Constitution when he does not pursue before a state's highest court a state law claim rejected on the merits by a state's intermediate appellate court. Because I am unable to agree with that unprecedented ruling, I respectfully dissent.

Angel Claudio has twice received less than top-flight legal representation in the course of proceedings that led to his state court conviction for second-degree murder. First, his state court trial counsel failed to advise him fully before he confessed to the crime. That failure was arguably a violation of both his Sixth Amendment right to the effective assistance of counsel and his broader state law right protected by the New York constitution. The state trial court suppressed his confession on Sixth Amendment grounds, but the Appellate Division, on an interlocutory appeal by the prosecution, properly reversed the suppression order, since the confession had been made before the Sixth Amendment right to counsel had attached. *People v. Claudio*, 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dep't 1982).

Though Claudio's state court appellate counsel had defended the suppression order only on Sixth Amendment grounds, the Appellate Division, on its own motion, elected to consider whether the confession had been

obtained in violation of state law. The Appellate Division *ruled that Claudio had a state law right to counsel when* he confessed, *id.* at 256, 447 N.Y.S.2d at 979, but that this right assured him only the presence of counsel, rather than performance of counsel above some minimum level of professional competence, *id.* at 257-61, 447 N.Y.S.2d at 980-82. In the Appellate Division's view, the quality of counsel's representation, as a matter of state law, must meet standards of adequacy when rendered in court where judicial supervision is available, but that standards of adequacy cannot be enforced with respect to legal services rendered in investigative proceedings where judicial supervision is less readily available. *Id.*

At that point, the second lawyering inadequacy occurred. Challenging the Appellate Division's reversal of the suppression order in an appeal to the New York Court of Appeals, Claudio's state court appellate counsel argued only that trial counsel's performance had violated Claudio's federal rights under the Sixth Amendment and failed to include in his appeal the claim that the confession violated Claudio's state law right to effective assistance of counsel. Though the state law claim had been adjudicated by the Appellate Division to be without merit, a majority of the panel hearing this habeas corpus appeal now concludes that the state law claim had sufficient likelihood of success that Claudio's state court appellate counsel denied him a federally protected right to the effective assistance of counsel by failing to argue the state law claim to the Court of Appeals.

This ruling unduly extends habeas corpus jurisdiction and the Due Process Clause. To reach such a ruling, the majority takes several steps that need to be separately identified.

1. *"Critical stage."* The majority holds that the appeal to the New York Court of Appeals from the Appellate Division was a "critical stage," *United States v. Wade*, 388 U.S. 218, 227 (1967), at which Claudio was entitled under the Due Process Clause to the effective assistance of counsel. I have no doubt that this appeal was an important stage, the outcome of which could be critical for Claudio. But whether it was a "critical stage" for Sixth Amendment purposes is uncertain.

The Supreme Court has ruled that whatever right to counsel exists at the post-conviction appellate stage of a state criminal case is secured directly by the Due Process Clause of the Fourteenth Amendment, rather than through incorporation of the Sixth Amendment, which protects the "trial-level right to counsel," *Evitts v. Lucey*, 469 U.S. 387, 392 (1985); *see Ross v. Moffitt*, 417 U.S. 600, 608-11 (1974); *Miller v. Keeney*, 882 F.2d 1428, 1431 n.4 (9th Cir. 1989).[1] The Court has also ruled that there is no Due Process right to counsel in discretionary post-conviction appeals. *See Coleman v. Thompson*, 111 S. Ct. 2546, 2568 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). Claudio's appeal to the Court of Appeals was discretionary, but it was a pre-conviction appeal. The majority relies on *Ross v. Moffitt*, 417 U.S. at 610-11, where the Court noted the significant difference between having counsel prior to conviction "as a shield" and having counsel after conviction "as a sword." *Id.* I am not certain whether the Supreme Court would afford Sixth Amendment protection to a discretionary pre-trial appeal to challenge the lawfulness of a confession when such protection would not be available directly under the Due Process Clause to challenge the same confession on a discre-

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1 The right appears to have originally been grounded on the Equal Protection Clause. *See Douglas v. California*, 372 U.S. 353 (1963).

tionary post-trial appeal. But I will assume, for the argument, that the Sixth Amendment attached to the pre-trial discretionary appeal and consider the majority's subsequent steps.[2]

2. *Obligation to raise state law issues*. The majority next rules that a lawyer's failure to pursue on a state court appeal *a state law claim* can constitute a denial of federally guaranteed effective assistance of counsel. That is a significant ruling, not yet made by the Supreme Court,[3] nor by any prior decision of this Court. It is arguable that the federal guarantee of effective assistance of counsel, whether protected by the Sixth Amendment through the Due Process Clause or directly by that Clause, assures

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2 In considering whether the appeal to the New York Court of Appeals was a "critical stage" for purposes of a constitutional right to counsel, a third variable is arguably pertinent, in addition to whether the appeal is discretionary or of right, and whether it precedes or follows conviction. The third variable is whether the appeal is forced upon the defendant by the State or initiated by the defendant. The argument for considering the appeal to be a critical stage is stronger where the appeal is initiated by the State. In this case, the assessment of this third factor is complicated by the fact that the State initiated the appeal to the Appellate Division, but the defendant thereafter initiated the further appeal to the Court of Appeals.

3 Language in *Smith v. Murray*, 477 U.S. 527 (1986), gives superficial support to the view that reasonable competence includes consideration of state law issues. In determining whether state appellate counsel's omission of a claim on direct appeal to a state supreme court was so incompetent as to constitute cause that would excuse procedural default, the Court quoted counsel's subsequent explanation that " 'Virginia case law would [not] support our position at that particular time,' " *id.* at 531, and concluded that the decision not to pursue the claim was not incompetent "[v]iewed in light of Virginia law at the time [counsel] submitted his opening brief to the Supreme Court of Virginia," *id.* at 536. However, the claim omitted was a federal claim—that admission of psychiatric testimony violated the defendant's self-incrimination privilege protected by the Fifth and Fourteenth Amendments. *Id.* at 531. Though the matter is in some doubt, the Court appears to have concluded that counsel reasonably omitted a federal claim because prevailing state court decisions had previously rejected it. *See id.* at 540 (Stevens, J., dissenting).

state court defendants only effective assistance of counsel in enforcing the protections of federal law, leaving entirely to the states all questions as to whether counsel's performance was adequate to assure vindication of state law protections.

However, the few cases that have considered the issue, either explicitly or implicitly, have all ruled, or at least assumed, that counsel may be found ineffective for purposes of the federal Constitution by failing to pursue a state law claim in state court. Counsel was held ineffective for omitting a state law issue in *Nero v. Blackburn*, 597 F.2d 991, 993-94 (5th Cir. 1979); *see also Laffosse v. Walters*, 585 F. Supp. 1209, 1212-13 (S.D.N.Y. 1984) (semble) (counsel ineffective for filing *Anders* brief where non-frivolous claims, including state law claims, available), and in other cases, the adequacy of counsel has been assessed with reference to state law issues, though counsel was not deemed deficient. *See Miller v. Keeney*, 882 F.2d 1428, 1435 (9th Cir. 1989); *Parton v. Wyrick*, 704 F.2d 415, 416-17 (8th Cir. 1983).

Though the matter is not free from doubt, I agree with the majority that the federally guaranteed right to the effective assistance of counsel includes some obligation of counsel to assert claims and defenses grounded in state as well as federal law.

3. *Standard for assessing competence of appellate counsel.* The majority next considers the standard to be applied in determining whether counsel's failure to present a particular state law claim on appeal violates the federally protected right to effective assistance of counsel. The majority rules that the standard for assessing the competency of counsel in the trial context, *see Strickland v. Washington*, 466 U.S. 668 (1984), applies equally to the

appellate context.[4] *Strickland* announced a two-prong test for assessing ineffective assistance of counsel claims in the pre-trial and trial context. The first prong concerns counsel's performance. The claimant must show that counsel's performance fell below "an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, which means "simply reasonableness under prevailing professional norms." *Id.* The second prong concerns prejudice. The claimant must show a "reasonable probability" that reasonably competent assistance would have affected the outcome. *Id.* at 694.

I agree that the first prong of *Strickland* applies fully to the appellate context, but applying the second prong is unnecessary in the appellate context and risks both unfairness to habeas petitioners and excessive involvement of federal courts in state law issues. Though we have previously stated that both prongs of *Strickland* apply in the appellate context, *see Abdurrahman v. Henderson*, 897 F.2d 71, 74 (2d Cir. 1990), that decision involved no application of the first prong of *Strickland*—the competency of appellate counsel—since the panel assumed, for purposes of the habeas appeal, that counsel's performance had been constitutionally deficient. *Id.* at 74. The objections to applying *Strickland*'s second prong to the appel-

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4 The Supreme Court has not yet decided this issue. In *Evitts* the Court ruled only that if the right to counsel applied to an appellate proceeding, the right included the right to effective assistance of counsel, but the Court left open the issue of whether the standards for assessing the competency of counsel at the appellate stage were the same as at the trial stage. Since the State did not challenge the finding of appellate counsel's incompetency, the Court said that it "need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. Cf. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984)." *Evitts*, 469 U.S. at 392. Arguably, the "cf." cite to *Strickland* implies that the appellate standard might be different.

late context do not become apparent until a case like the pending one arises where the constitutional adequacy of appellate counsel needs to be assessed.

Strickland's second prong is unnecessary in the appellate context. The "reasonable probability of affecting the outcome" standard made very good sense in the context of the *Strickland* case, a challenge to counsel's performance at the investigation and trial stages of a criminal case. Since a trial cannot be reconvened and resumed to afford the defendant an opportunity to overcome counsel's misstep and secure a verdict unaffected by counsel's incompetence, the habeas court must make some reasoned assessment of the probability that competent lawyering would have affected the outcome.[5] However, in the con-

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5 On the facts of *Strickland*, a death penalty case, it would have been possible to remedy the allegedly deficient performance of trial counsel without making a "reasonable probability of affecting the outcome" prediction since the deficiency occurred at sentencing rather than during the presentation of evidence before the jury. Thus, had counsel's performance been found deficient, it would have been possible to issue a conditional writ, conditioned upon the State's affording new counsel an opportunity to take whatever investigatory steps competent counsel should have taken and then to argue to the trial court judge that the death penalty should not be imposed. But the Supreme Court ruled, even in the context of deficient lawyering occurring at sentencing, that the habeas court is to make a prediction as to whether there is a reasonable probability that a conscientious sentencer would have imposed a different sentence. *Strickland*, 466 U.S. at 695. The Court even imposed this prediction task on a habeas court in situations where a state appellate court performs the role of sentencer by independently reweighing the evidence pertinent to the penalty. *Id.*

Presumably, the Court was concerned that returning the matter for reconsideration by the same sentencer, after proper presentation by counsel, would not provide an adequate substitute for the decisionmaking that would have occurred if counsel had properly presented defendant's sentencing arguments at the initial sentencing. Yet, if the habeas court finds a reasonable probability that proper lawyering would probably have affected the sentencing, it is unlikely that the ultimate remedy would be anything more than resentencing. Thus, in *Strickland*, had counsel been

text of deficient lawyering on appeal, there is no reason to speculate about the probability of a different outcome: the state appellate court remains fully available to adjudicate the claim that appellate counsel failed to present.

Thus, in the appellate context, there is no reason to apply the second prong of *Strickland*. If the performance of appellate counsel in omitting a state law issue was outside the range of reasonable professional competence, the habeas court can afford the State the opportunity to resume the appeal by granting a conditional writ that orders a new trial unless the state appellate court entertains and, in the absence of a procedural bar, adjudicates the previously omitted claim. Indeed, that is the remedy adopted by the Court in this case.[6]

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considered deficient and had prejudice been found, the only consequence of the "probability" analysis, compared to omitting such analysis and returning the matter directly to the original sentencer, would have been resentencing before a different judge.

In any event, *Strickland*'s use of the "probability of affecting the outcome" test, even for lawyering deficiencies occurring at sentencing, does not require a habeas court to make a similar prediction of likely success when the alleged deficiency is the failure to present a legal claim to a state appellate court. Unlike sentencing, which involves an aggregate weighing of a variety of factors, consideration of the omitted issue by the appellate court can readily be performed as effectively upon presentation by new counsel on a new or reinstated appeal as it could have been by the original counsel. Since the Supreme Court, subsequent to *Strickland*, without pausing to make a "probability of affecting the outcome" analysis, has approved the use of a conditional writ that returns an omitted appeal to a state court for its consideration, *see Evitts v. Lucey*, *supra*, I see no need to use the second prong of *Strickland* in any case where it is convenient and fair simply to return the case to the state court for further consideration, once it has been determined that counsel's omission of a legal claim was constitutionally deficient.

6 The second prong is also unnecessary in the appellate context if the omitted claim is grounded on federal law. If the habeas court determines that appellate counsel's omission of the federal issue was below the range of prevailing professional norms, the habeas court itself is competent to adjudicate the merits of the omitted claim.

It is arguable that some vestige of the second prong of *Strickland* should remain for the situation where appellate counsel was incompetent for failing to raise what would have been a winning claim but the claim, if sustained, would not have resulted in a reversal. But there is little point in making a separate "reasonable probability of affecting the outcome" analysis, since appellate counsel could not possibly be deemed to have performed outside the range of reasonable professional competence by omitting an issue that would have been considered harmless error.

Applying the prejudice prong of *Strickland* to the appellate context is not only unnecessary, but it also risks altering the first prong by importing into the assessment of competency the "reasonable probability" language of the prejudice inquiry. Thus, in the pending case, the majority starts with the second prong and analyzes the issue omitted by the state court appellate counsel to see if it had a "reasonable probability" of success. Since *Strickland* used "reasonable probability" to measure the likelihood that a trial outcome would have been different (in order to assess prejudice from lawyering already determined to be deficient), it is ill-advised to press this same standard into service for the different task of determining whether counsel's performance was deficient.

In my view, the proper analysis for assessing a claim of ineffective *appellate* counsel is to determine initially whether the failure to pursue the omitted issue is outside the range of reasonable professional competence and, if so, whether there is at least a substantial argument that the alleged error would not be deemed harmless. Of course, in making a determination whether appellate counsel's omission of an issue was outside the range of reasonable professional competence, the habeas court will have to make

some assessment of the merits of the omitted issue. Even if the issue can fairly be considered non-frivolous, its omission is not necessarily professional incompetence, in view of counsel's broad discretion to select from among available claims those thought more likely to be successful. *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983).

By invoking in the appellate context the "reasonable probability of affecting the outcome" standard from the trial context, the majority creates the risk, no doubt inadvertently, that some defendants will be denied an opportunity to have presented to state courts some state law issues that reasonably competent counsel would have asserted and that might, after issuance of a conditional writ, prove successful in state court, but that might not be thought by a federal habeas court to have a "reasonable probability of affecting the outcome." In other words, appellate counsel might, in some instances, be found to have performed below the level of reasonable competence, even though the habeas court is not persuaded that the omitted issue is a likely winner. In a case like the pending one, where the omitted claim is based on state law, the test should be simply whether the claim had sufficient merit, in view of the other available issues, that reasonably competent counsel would pursue it; the habeas court's prediction that the state law claim would probably be meritorious in state court is wholly unnecessary and, indeed, inappropriate for a federal court.

4. *Omission of state law issue rejected by state intermediate court.* That brings me to the majority's fourth and most questionable step, the ruling that Claudio's state court appellate counsel was constitutionally deficient in this case. The majority rules that appellate counsel's failure to carry to the Court of Appeals the state law claim

rejected by the Appellate Division was constitutionally deficient. Whatever standard is used to assess the competency of state court appellate counsel, I cannot agree that counsel was constitutionally deficient in omitting that issue from his second-level appeal.

The majority undertakes a detailed analysis of state law and finds a "reasonable probability" that Claudio's state law claim would have succeeded in the Court of Appeals. In my view, that analysis extends the constitutional right to counsel beyond the authority of a federal habeas court in a case such as this where an intermediate state appellate court has ruled that the state law claim is without merit.

The Appellate Division faced what it regarded as an issue of first impression under New York law. *See People v. Claudio*, 85 A.D.2d at 257, 447 N.Y.S.2d at 980. Recognizing that under New York law the right to counsel may attach at an earlier time than under federal law and that the state right to counsel had attached at the time of Claudio's confession, the Appellate Division had to decide whether the state law right to counsel includes not only the presence of counsel but also the competent assistance of counsel prior to the initiation of formal judicial proceedings. The Appellate Division ruled that state law does not provide such protection. It reasoned that the right to the competent assistance of counsel could be enforced by courts where counsel acted in the course of judicial proceedings, but that state law imposed no obligation on police or prosecutors to monitor the quality of legal assistance rendered by defense counsel.[7] *Id.* at 257-61, 447 N.Y.S.2d at 980-82.

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7 The Appellate Division expressed no opinion on whether a state law right to effective assistance of counsel would be denied if at a pre-accusation stage, interrogators were aware that a suspect was confessing on

I do not know whether the Appellate Division's ruling is a correct interpretation of New York law. A subsequent decision of the New York Court of Appeals, *People v. Beam*, 57 N.Y.2d 241, 455 N.Y.S.2d 575 (1982), decided seven months later, lends arguable support to the Appellate Division's ruling, but is arguably distinguishable, as the majority in this case contends, ____ F.2d at ____. But however New York law will ultimately be explicated on Claudio's state law claim,[8] the undeniable fact is that an intermediate appellate court has ruled that the claim lacks merit. That ruling is not merely a precedent from some other litigation of arguable relevance to Claudio's case, to which a federal court would owe considerable deference if the correctness of the ruling were directly in issue. *See West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237-38 (1940) (decision of state intermediate appellate court on state law issue "not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide oth-

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the basis of incompetent legal advice. *People v. Claudio*, 85 A.D.2d at 261 n.7, 447 N.Y.S.2d at 982 n.7.

8 The two judges of the Court of Appeals who dissented in *Claudio* are fairly to be understood as upholding Claudio's state law claim, even though all members of the Court of Appeals adjudicated only his federal law claim since the state law claim had not been argued. The dissenting judges expressed the view that regardless of when the federal right to counsel attaches, guaranteeing a defendant the right to the presence of counsel, the defendant has a right to the effective assistance of counsel "once counsel has been engaged." *People v. Claudio*, 59 N.Y.2d 556, 565, 466 N.Y.S.2d 271, 276 (1983) (Jones, J., with whom Meyer, J., joins, dissenting). Though the Supreme Court has subsequently ruled that the federal right to counsel does not attach prior to the initiation of adversary proceedings simply because an attorney-client relationship has been formed, *see Moran v. Burbine*, 475 U.S. 412, 430-31 (1986), thus barring a claim of ineffective assistance of counsel, *see Coleman v. Thompson, supra*, the dissenting judges in *Claudio* would presumably have applied their view concerning a right to effective assistance of counsel whenever engaged to the state law right to counsel.

erwise"). The ruling was rendered *in* Claudio's case.[9] In my view, an appellate lawyer can never be found to have denied his client the effective assistance of counsel guaranteed by the federal Constitution for electing to omit on appeal to a state's highest court a state law claim that has been rejected on the merits by a state's intermediate appellate court, at least in the absence of some contradictory ruling from the state's highest court prior to the time the second-stage appeal is filed.

In asserting that virtually *per se* position, I must reckon with the argument that since appellate counsel can be found to be constitutionally ineffective for omitting on a first-stage appeal a state law issue rejected on the merits by a trial court, the same test of competence should apply when counsel omits from a second-stage appeal an issue rejected on the merits by an intermediate appellate court. The superficial symmetry of this argument ignores the nature of the appellate function. Appellate courts sit to examine rulings of trial courts and correct what they perceive to be errors. Trial courts, of course, are equally bound to apply the law, but they function in a different environment. Their trial responsibilities oblige them to rule rapidly. Appellate courts enjoy the luxury of time for more reflective decisionmaking. No doubt some trial court rulings represent the result of prolonged and painstaking examination and some appellate court rulings are hasty and ill-considered. But the institutional differ-

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9 In *West*, the Supreme Court ruled that the law "announced and applied [by the state intermediate appellate court] is the law of the state applicable in the same case and to the same parties in the federal court." *Id.* at 238. The full rigor of that ruling is not precisely applicable to a case such as this where the question is whether appellate counsel was constitutionally deficient in failing to seek reversal of the intermediate court's decision, but the Court's view nevertheless reenforces my belief that counsel's omission was not incompetence.

ences between the levels of court persuade me that in giving content to the federal guarantee of effective assistance of appellate counsel, a federal court may properly consider counsel's failure to appeal a trial court's rejection of a state law claim but may not consider the failure to pursue a second-stage appeal of a state law claim rejected on its merits by an intermediate appellate court.

A proper regard for federalism interests reenforces my conclusion. It is already a significant broadening of the Due Process Clause, with a corresponding expansion of federal habeas jurisdiction, to include state law issues in determining whether counsel's choice of claims and defenses constituted effective assistance. That step is a reasonable accommodation between the Due Process value of assuring defendants effective participation in the adversary process and the federalism interests in limiting federal court intrusion into matters of state criminal law. But once an intermediate state appellate court has rejected a state law claim on the merits, the role of a federal habeas court would be unduly broadened if it undertook to determine whether counsel was incompetent in not challenging that decision before the state's highest court. Federal habeas corpus courts have no authority to correct what they perceive to be state court errors of state law. They should be equally barred from undertaking to predict the likelihood that a state's intermediate court will be reversed by a state's highest court on an issue of state law, yet that is precisely the assessment the majority makes in this case in determining that Claudio's counsel was incompetent in not pursuing his state law claim despite the rejection by the Appellate Division.

5. *The remedy.* Having determined that Claudio's state court appellate counsel was constitutionally deficient for not pursuing in the Court of Appeals the state law inef-

fective assistance of trial counsel claim, the majority directs the issuance of a writ of habeas corpus, unless the State affords Claudio an opportunity to "present" his state law claim to the New York Court of Appeals. Normally, where a state prisoner persuades a habeas court that he has been denied a federally protected right, he is entitled to a writ conditioned upon a new trial. In this case, though I find no basis to grant habeas relief, I agree with the majority that if appellate counsel's performance was constitutionally deficient, the proper remedy is to condition the writ only on the State's obligation to afford Claudio an opportunity to return to the New York Court of Appeals. *See Evitts v. Lucey*, 469 U.S. at 390 (writ conditioned on either retrial or reinstatement of appeal); *Laffosse v. Walters*, 585 F. Supp. at 1214 (writ conditioned on granting of new appeal). That return, however, is only for the opportunity to "present" his state law claim, as the majority is careful to state. The reason for that limited opportunity arises from the unusual procedural circumstances of Claudio's case.

Initially, the prosecution took an interlocutory appeal to the Appellate Division from the trial court's ruling suppressing the confession on federal constitutional grounds. When that ruling was reversed, Claudio's counsel appealed the reversal to the New York Court of Appeals. That Court ruled that Claudio's state law challenge to his confession would not be considered because appellate counsel had not asserted the state law claim in either the trial court, the Appellate Division, or the Court of Appeals. *People v. Claudio*, 59 N.Y.2d at 560 n.1, 466 N.Y.S.2d at 272 n.1. On the pending appeal, the State argues that the Court of Appeals was procedurally barred from considering the state law claim because, wholly apart from appellate counsel's omission of the issue, an

appellate court, under state law, can consider on an interlocutory appeal only the grounds on which a trial court's ruling rested. *See People v. Karp*, 76 N.Y.2d 1006, 1009, 565 N.Y.S.2d 751, 751 (1990); *People v. Cade*, 74 N.Y.2d 410, 418, 548 N.Y.S.2d 137, 141 (1989). The majority contends that this procedural bar is inapplicable because the Appellate Division decided the merits of the state law claim and the State briefed the issue in the Court of Appeals.

Whether or not the state law claim was procedurally barred on the interlocutory appeal is a matter of state law. However that procedural issue would have been resolved had appellate counsel pursued the state law claim in the Court of Appeals on the pre-trial appeal, the outcome will not necessarily be the same on the post-trial appeal now afforded by virtue of the conditional writ. *See People v. Goodfriend*, 64 N.Y.2d 695, 697, 485 N.Y.S.2d 519, 521 (1984). Because we cannot be certain whether the Court of Appeals can now reach the merits of Claudio's state law claim, I agree that, if, contrary to my view, appellate counsel was constitutionally deficient in not arguing the state law claim to the Court of Appeals, the proper remedy is to afford Claudio only the opportunity to "present" the claim, leaving it to the Court of Appeals to decide whether it has authority to adjudicate that claim.

To the extent indicated in the foregoing, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

89 CV 3410 (ERK)

ANGEL CLAUDIO,

Petitioner,

—against—

CHARLES SCULLY, Superintendent,
Greenhaven Correctional Facility, et. al.,

Respondent.

MEMORANDUM OF LAW

KORMAN, J.

In the early morning hours of May 15, 1980, Steven Zweikert was returning home from a high school prom. As he emerged from the subway in Queens at about 4:00 a.m., he was followed and accosted by four youths. Among them was the petitioner, Angel Claudio, who brandished a gun. When one of the boys demanded money, Steven tried to wrest the gun from Claudio and in the struggle was fatally shot. Claudio and his cohorts fled the scene

On May 21, 1980, the police were advised that individual named Andrew Boyle had information about the murder. In response to police questioning, Boyle told the police that on May 14, 1980 between 6:00 and 8:00 p.m. he was in a "green mustang" with some other boys, one of whom had a gun. Boyle was then shown several photos. He identified Angel Claudio as the one with the gun. Claudio had previously been picked up for questioning by the police about the murder. After denying any involvement in the crime he was released.

As a result of this encounter with the police, Claudio consulted the yellow pages and called attorney Mark Heller on May 21, 1990. Claudio met with Heller the next day and retained him as his attorney. After a discussion with Heller, Claudio agreed to turn himself in to the Queens District Attorney, John J. Santucci. Although some conflict existed as to the advice Heller gave to Claudio, the trial court found that Heller did not advise him of the seriousness of the charges he faced or his available defenses. Rather, he urged Claudio to surrender, explaining that Claudio might be able to obtain probation if he did so. When they arrived at the District Attorney's Office later that afternoon, however, Santucci informed Heller that there would be no plea bargain. Heller did not relay this information to his client. Instead, he advised Claudio to make a statement.

In the presence of his attorney, and after *Miranda* warnings were given, Claudio indicated that he wanted to confess because he was so troubled by what had happened that he was unable to eat or sleep. Claudio gave the following account of the events of May 15, 1980. He and his friends were in a car when they saw Steven Zweikert exiting the subway. One of Claudio's friends asked him to retrieve a gun that had been placed under the seat. The group then got out of the car and followed Steven down the street. Claudio pointed the gun at Steven while another demanded money. When Steven tried to grab the gun from Claudio, it accidentally discharged, fatally striking Steven in the chest. Claudio and his friends fled emptyhanded.

Before trial, a newly appointed attorney moved to suppress the confession on the ground that Claudio had been denied effective assistance of counsel. Although the motion was granted by the trial judge, the Appellate Division held that Claudio's Sixth Amendment right to counsel had not attached at the time of his confession. Accordingly, the confession could not be excluded even if it was the result of Heller's foolish advice. In addition, although the issue had not been raised by the parties, the Appellate Division determined that

Heller's conduct did not violate Claudio's right to counsel under the New York State Constitution. *People v. Claudio*, 85 A.D.2d 245 (2d Dept. 1982). The New York Court of Appeals affirmed the Appellate Division's holding that the Sixth Amendment had not been violated and that Claudio's confession should not have been suppressed. *People v. Claudio*, 59 N.Y.2d 556 (1983). Because Claudio failed to raise the issue in either the Court of Appeals, the Appellate Division or in his suppression motion, the Court of Appeals declared that it had "no occasion consider the application of the state constitution to defendant's situation." 59 N.Y.2d at 560 n. 1.

Claudio was tried and convicted of the crimes of murder, attempted robbery and possession of a weapon. The Appellate Division affirmed the conviction, although it held that the trial court erred in imposing consecutive rather than concurrent sentences. Accordingly, it modified petitioner's sentence to 25 years to life. *People v. Claudio*, 130 A.D.2d 759 (2d Dept. 1987). Judge Hancock denied Claudio's application for leave to appeal to the Court of Appeals. *People v. Claudio*, 70 N.Y.2d 873 (1987).

After exhausting his post-conviction appeals, Claudio filed this petition for a writ of habeas corpus. Subsequently, while proceedings on this petition were held in abeyance, Claudio sought a writ of error *corum nobis* from the New York Court of Appeals on the ground that he had been denied effective assistance of counsel by his appellate attorney's failure to argue to the Court of Appeals that the suppression of his confession was mandated by the New York State Constitution. The petition was dismissed on the ground that there was "no authority for initiating such a writ in the Court of Appeals." *People v. Claudio*, 77 N.Y.2d 988 (1991). After this unsuccessful effort to obtain relief from the Court of Appeals, Claudio again pressed his petition here. The petition, which raises four separate issues, is denied for the reasons that follows.

(1)

Petitioner argues that his confession should have been suppressed because it was the result of his attorney's ineffective advice. This claim must be rejected because the Supreme Court has held that a defendant cannot claim that he was denied the effective assistance of counsel in a proceeding in which he is not entitled to counsel under the Sixth Amendment. *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991); *Wainwright v. Torna*, 455 U.S. 586 (1982). The Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings had been initiated." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). No such proceeding had been commenced when petitioner confessed.

Commonwealth v. Moreau, 572 N.E.2d 1382 (Mass. App. Ct. 1991), *cert. denied*, 112 S.Ct. 915 (1992), upon which petitioner relies, does not provide a sound basis for a contrary holding. The Appeals Court there held that a defendant who was subject to post-arrest custodial interrogation did not enjoy a right to counsel under the sixth Amendment. The Appeals Court, however, held that the defendant was "entitled to the aid of counsel to protect his Fifth Amendment privilege against self-incrimination under *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Gouveia*, 467 U.S. 180, 188 n.5 (1984)." *Moreau*, 572 N.E.2d at 1384. Accordingly, it concluded that the defendant was entitled to a hearing on his claim that his lawyer was ineffective because he advised him to make a post-arrest confession. *Id.* at 1386.

While it is true that *Miranda v. Arizona* holds that a suspect who is subject to custodial interrogation is entitled to counsel "to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel," *United States v. Gouveia*, 467 U.S. at 188 n.5, it is equally true that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). Accordingly, an attorney who ensures that his client has not

been compelled to speak effectively performs the role that the Supreme Court envisioned for him in *Miranda*.

Particularly apposite here is the discussion in *Miranda* of the advice an attorney would give a suspect and the role he would play during an ensuing interrogation. Chief Justice Warren observed that, if a suspect asked to speak to an attorney before submitting to a custodial interrogation, the "attorney may advise [him] not to talk to police until he has had an opportunity to investigate the case, or [the attorney] may wish to be present during any police questioning." *Miranda*, 384 U.S. at 480.

> If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Id. at 470

"The Court's vision of a lawyer 'mitigating the dangers of untrustworthiness' by witnessing coercion and assisting accuracy is largely a fancy; for if counsel arrives there is rarely going to be a police station confession." *Miranda v. Arizona*, 384 U.S. at 516 n.12 (Harlan, J. dissenting). Nevertheless, Chief Justice Warren's "vision" of the role of counsel is fundamentally consistent with the premise of the *Miranda* majority that a suspect is entitled to counsel to prevent law enforcement officers from coercing a confession and not to prevent a defendant from confessing voluntarily. Indeed, the Chief Justice emphasized that "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478.

The situation would be otherwise if petitioner had been advised foolishly to take the stand at his trial and confess. While he could not have alleged that he was compelled to be a witness against himself, he could have argued that he was deprived of the effective assistance of counsel. Unlike a defendant at a trial, who is entitled to the effective assistance of counsel, "to ensure that the prosecutor's case encounters 'the crucible of meaningful adversarial testing,' " *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)), petitioner was entitled to the presence of counsel when he was interrogated only "in order to protect the Fifth Amendment privilege" against self-incrimination. *Miranda*, 384 U.S. at 470. Accordingly, his voluntary confession was not subject to suppression merely because his attorney gave him bad advice. *See Colorado v. Connelly*, 479 U.S. at 170; *Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

There is a suggestion here that it is somehow unjust that petitioner should suffer because of the incompetent advice of his attorney. The answer, to quote the words of Judge Keating in related context, is that while petitioner may not have been fortunate enough to have chosen competent counsel, "[t]his is a wholly different thing from talking about justice." *People v. McQueen*, 18 N.Y.2d 337, 350 (1966) (Keating, J. concurring). Petitioner, it should be recalled, murdered Steven Zweikert, a young man at the threshold of his adult life. Petitioner's guilt was established by a confession that was freely and voluntarily given. If his attorney had given petitioner the sound advice to which he claims he was entitled, he would have gotten away with murder.

The Supreme Court recently observed in *McNeil v. Wisconsin*, that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, [without which] society would be the loser. Admissions of guilt resulting from valid *Miranda* warnings 'are more than merely 'desirable' they are essential to society's compelling interest in finding, convicting and punishing those who violate the

law.' " 111 S.Ct. 2204, 2210 (1991) (quoting *Moran v. Burbine*, 475 U.S. at 426). This language applies with equal force here.

(2)

Petitioner argues, alternatively, that his confession should have been excluded because under New York law he was entitled to the effective assistance of counsel at the time he confessed. Because this argument would not provide a basis for habeas corpus relief, petitioner argues that he was deprived of the effective assistance of counsel by virtue of the failure of his assigned counsel to rely on New York law during the pretrial and appellate proceedings relating to the suppression of his confession. This argument fails because petitioner cannot meet his burden of demonstrating that "the neglected claim would have [had] a reasonable probability of success on appeal." *Heath v. Jones*, 941 F.2d 1126, 1132, *reh'g. en banc, denied*, 948 F.2d 729 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 981 (1992). On the contrary, it seems clear that the suppression of petitioner's confession was not required by New York law.

Article I of the New York State Constitution provides in pertinent part that "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him." N.Y. Const., Art. 1, § 6 (McKinney 1982). While this clause ensures a defendant the right to the assistance of counsel "in any trial in any court," the New York Court of Appeals has largely ignored this limiting language and has held that, under certain circumstances, a suspect may be entitled to the assistance of counsel even if he has not been charged with a crime. *See People v. Donovan*, 13 N.Y.2d 148 (1963); *People v. Skinner*, 52 N.Y.2d 24 (1980). *See also People v. Cunningham*, 49 N.Y.2d 203 (1979). If such a suspect is interrogated without his attorney

present, any resulting confession will be excluded from evidence at trial.

In this very case, however, the Appellate Division raised the issue *sua sponte* and held that petitioner's confession was not subject to this exclusionary rule. While it acknowledged that petitioner was entitled to the assistance of counsel when he confessed, the Appellate Division distinguished this case from those in which a suspect was questioned without a lawyer:

> *People v. Donovan*, 13 N.Y.2d 148, and its progeny require that the authorities refrain from questioning a defendant or suspect outside of the presence of his attorney absent a waiver of his rights made in the presence of counsel. We see no reason to require, as is indeed required in instances where judicial proceedings have commenced, that the courts go beyond the presence of counsel and examine the quality of his advice. Uniformly, cases which examine the effectiveness of counsel involve situations in which the State, usually through its Judges, has failed in its duty to oversee the criminal process and to discern and prevent ineffective representation. . . . This factor of judicial involvement is not present in a case such as this, where the claim of incompetence focuses on events prior to any judicial proceedings.

85 A.D.2d at 257-58 (footnotes omitted). Accordingly, although "Heller's advice may have been egregious," it did not by itself require the suppression of the confession because Heller's "actions did not occur in the context of a trial or other proceeding wherein a Judge should have been aware of it and corrected it." *Id.* at 258.

The Appellate Division then considered and rejected the argument that law enforcement officers should be required to assess the competency of counsel's advice at the time a confession is taken. The considerations of policy that were cited in support of this holding need not be repeated here. Suffice

it to say that the Appellate Division construed the New York Constitution to require no more than that law enforcement officers respect a suspect's choice to deal with them through an attorney. *Id.* at 260.

Shortly after the Appellate Division's decision and before it decided petitioner's appeal, the New York Court of Appeals decided *People v. Beam*, 57 N.Y.2d 241 (1982), in which it held that a suspect's right to counsel had not been violated where, on the advice of counsel, he voluntarily submitted to police interrogation.[1] The Court of Appeals declared that once the police have been advised that the suspect has, upon the advice of counsel, waived the right to remain silent, there is "no obligation on the part of the police to seek some form of independent assurance that the decision of the suspect and his attorney is [ ] good advice." *Id.* at 253.

Petitioner argues that *Beam* is distinguishable because in that case the attorney's poor advice was a result of the defendant's deliberate failure to disclose the true nature of the police interrogation. Petitioner's Memorandum at 40. The fact that the defendant "misinformed his attorney as to the nature of the incident about which the police were seeking to question him" did provide additional support for the result in *Beam*, but the holding did not turn on the defendant's misrepresentation to his attorney. *Id.* at 254. The Court of Appeals, instead, made it plain that "[w]hen a person has had the benefit of counsel and then chooses to waive one of his rights, the police are not required to question the validity of that decision as long as they are assured that the decision was made in consultation with the suspect's attorney." *Id.*at 253. Indeed, the Court of Appeals concluded its opinion by stating that "as long as the police honored the defendant's right to counsel, and determined that he was speaking with them on

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[1] The Court of Appeals decided *People v. Beam* on October 19, 1982, after the Appellate Division decision in *Claudio* on March 15, 1982 and before the Court of Appeals decision in *Claudio* on July 7, 1983.

advice of counsel, the defendant was afforded all the protections encompassed by the constitutional right to counsel." *Id.* at 255.

Beam is the only Court of Appeals case dealing with effectiveness of attorney advice in such preliminary encounters with law enforcement. Even if it left room to argue that an attorney's "woefully inadequate" advice to confess at a pre-indictment stage denies a suspect effective assistance of counsel, petitioner has failed to meet his burden of demonstrating that it is reasonably probable that the Court of Appeals would have accepted this argument.

(3)

Petitioner argues that the trial court's refusal to call the District Attorney as a witness on the issue of the voluntariness of his confession violated his Sixth Amendment right to compulsory process. While the Compulsory Process Clause guarantees a defendant the right to call witnesses "relevant and material to the defense," *Washington v. Texas*, 388 U.S. 14, 23 (1967), it does not eliminate a trial court's " 'wide latitude' to exclude evidence that is 'repetitive . . . , only marginally relevant,' or poses an undue risk of 'harassment, prejudice [or] confusion of the issues.' " *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (quoting *Delaware v. Van Ardsall*, 475 U.S. 673, 679 (1986).

The testimony of the District Attorney would have been repetitive of the testimony given by his Chief Assistant. Petitioner argues that Santucci's testimony was necessary to demonstrate that Heller was a "publicity hungry attorney" who was motivated to obtain his client's confession solely for his own interest. This point was sufficiently made with the testimony of Chief Assistant Fisch, who was present at the meetings between Mr. Santucci and defendant's attorney Heller. Fisch testified at trial that "no promises were made to Mark Heller in exchange for petitioner's confession, that Heller appeared at a press conference with Santucci and that

he could not have done so had Santucci not invited him." Petitioner's Memorandum of Law at 20. Indeed, in arguing that Santucci would have provided additional information, petitioner points to facts that were brought to Santucci's attention by Fisch. *See* Petitioner's Memorandum of Law at 50.

The only information cited by petitioner that would add anything to Fisch's testimony is Santucci's statement at the preliminary hearing that it was the belief of one of the assistants in his office that Heller's conduct was improper and that Heller was motivated by publicity. This hearsay statement, was, at most, marginally related to the issue of the confession's voluntariness or reliability. Moreover, because petitioner did not take the stand to explain why he confessed or to deny his guilt, it is inconceivable that Santucci's profert testimony, if it had been admitted, would have caused the jury to disregard petitioner's confession and acquit him.

(4)

The evidence at trial included the preliminary hearing testimony of Andrew Boyle, who had died prior to trial. In his hearing testimony, which was read to the jury, Boyle stated that on the evening of May 14, 1980 his friend "Buck" and Claudio, who was sitting in the backseat, drove up to Boyle's house in a green mustang. After Boyle got in the car, Buck told him that they were planning a robbery, and asked Boyle if he wanted to join them. Sometime during the car ride he saw Claudio holding a gun. Boyle left the car at about 8:00 that evening and did not participate in the robbery.

Petitioner argues that the admission of this testimony violated the Confrontation Clause because the statement was not sufficiently trustworthy. Where an out-of-court statement falls within a "firmly rooted hearsay exception," however, the Confrontation Clause requires no further inquiry into its reliability. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); *Idaho v. Wright*, 110 S.Ct. 3139, 3146 (1990). No confrontation vio-

lation occurred here because Boyle's statement was admissible under the former testimony exception, which is "one of the most firmly rooted" exceptions to the hearsay rule. *United States v. Salim*, 855 F.2d 944, 955 (2d Cir. 1988). *See also United States v. Zannino*, 895 F.2d 1, 5 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990); *United States v. Kelly*, 892 F.2d 255, 262 (3d Cir. 1989), *cert. denied*, *Gifford v. United States*, 110 S.Ct. 3243 (1990). Pursuant to that exception the statement of an unavailable declarant is admissible in a criminal case where the party against whom the testimony is offered has "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed. R. Evid. 804(b)(1). Here petitioner had the opportunity to and did cross-examine Boyle at the preliminary hearing on the very issue for which the testimony was introduced at trial—the identification of petitioner.

Petitioner argues that because *Wade* hearing testimony is not admissible as former testimony in New York, Boyle's testimony did not fall within a firmly rooted hearsay exception. Petitioner's Memorandum of Law at 55. The question here, however, is not the basis upon which the out-of-court statement was actually admitted, but whether its admission offends the Confrontation Clause. On the facts here, there is no basis for such a claim. *See Roberts*, 448 U.S. at 70-73.

Conclusion

Accordingly, for the foregoing reasons, the petition for a writ of habeas corpus is denied. In so doing, I wish to acknowledge my appreciation to Professor William E. Hellerstein of Brooklyn Law School and Proskauer Rose Goetz & Mendelsohn, the law firm with which he is associated, for their extraordinarily able *pro bono* representation of the petitioner.

SO ORDERED:

Edward R. Korman
United States District Judge

Dated: Kew Gardens, New York
April 3, 1992

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

ANGEL CLAUDIO,

Appellant.

Argued June 9, 1983; decided July 7, 1983

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 15, 1982, which (1) reversed, on the law, so much of an order of the Supreme Court (KENNETH N. BROWNE, J.), entered in Queens County, as granted a motion by defendant to suppress his confession, and (2) denied the motion with respect to defendant's confession. . . .

POINTS OF COUNSEL

Albert A. Gaudelli for appellant. . . . *John J. Santucci, District Attorney* (*Joseph Fisch, Joseph J. Hester* and *Deborah Carlin Stevens* of counsel), for respondent. . . .

OPINION OF THE COURT

Chief Judge COOKE.

The question presented by this appeal is whether defendant's confession to police, made in a noncustodial setting before a criminal prosecution had commenced must be suppressed as the product of the ineffective assistance of defendant's retained counsel. This court concludes that suppression of statements made at such an early stage of an investigation is not required, because defendant's Sixth Amendment right to counsel had not yet attached.

In the early morning hours of May 15, 1980, a 16-year-old high school student returning from a prom was robbed and fatally shot on a Queens street. Four days later, as the result of an anonymous tip, police went to the home of defendant Angel Claudio, who was also 16 years old. Defendant, accompanied by his stepmother, went to the precinct station house at the officers' request. He stated that he had been at home sleeping at the time of the murder, and was allowed to leave.

On May 21, 1980, defendant called the law firm of Heller & Heller, whose listing he had come across in the telephone directory. Attorney Mark Heller returned the call and met with defendant and defendant's cousin the following morning. Defendant retained Heller to represent him in connection with the shooting. Heller and defendant, after a discussion, determined that defendant would surrender to the Queens County District Attorney. Defendant and Heller offered sharply differing accounts at the suppression hearing of what Heller advised his client to say to the authorities. The finding of the courts below, which is supported by the record, was that Heller did not explain the seriousness of the charges defendant might face or his available defenses. The lawyer told defendant that the best course of action was to surrender, and that the lawyer might be able to obtain probation or parole without jail time if defendant did so.

When defendant and his attorney arrived at the District Attorney's office, the lawyer was told by a prosecutor that there was insufficient evidence to charge defendant unless he confessed. He was also informed that there would be no plea bargain. The lawyer did not ask whether defendant was wanted by the police. The courts below found that, after further conversations with representatives of the District Attorney's Office, Heller advised his client to make a statement. With his attorney present, defendant was interviewed by the authorities and made extensive inculpatory admissions, resulting in his arrest.

Heller subsequently made a plea through the media for other persons involved in the murder to come forward, and arranged for another young man, Randolfo Maldonado, to surrender after Maldonado contacted him. Both young men were subsequently indicted for murder in the second degree, attempted robbery in the first degree, and criminal possession of a weapon in the second degree. This appeal involves only defendant Claudio.

At the suppression hearing, defendant argued that the performance of Heller, who by that point had been replaced by assigned counsel, had denied defendant effective assistance of counsel. The court agreed and ordered defendant's statements suppressed. The Appellate Division reversed and denied the motion to suppress, holding that defendant's Sixth Amendment right to counsel had not attached because formal judicial proceedings had not commenced.

At the outset, it should be noted that all members of this Court are in agreement that the performance of defendant's lawyer was woefully inadequate. The issue to be determined, however, is whether the lawyer's conduct, coming before the commencement of a criminal prosecution, violated defendant's right to counsel under the Sixth Amendment.[1]

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[1] Defendant asserts only a violation of the Sixth Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment. Defendant does not claim before this Court, nor did he do so at the suppression hearing or before the

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." With respect to this right, "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel" (*McMann v Richardson*, 397 US 759, 771, n 14; *see People v Baldi*, 54 NY2d 137, 146). In assessing effective assistance, no distinction is to be drawn between assigned and retained counsel (*Cuyler v Sullivan*, 446 US 335, 344; *People v Aiken*, 45 NY2d 394, 401).

Furthermore, the right to assistance of counsel in a criminal proceeding attaches well before the opening of the actual trial. Indeed, more than fifty years ago, the Supreme Court based its reversal in a capital case on the "conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself" (*Powell v Alabama*, 287 US 45, 57).

In the long line of cases that followed the Supreme Court's historic decision in *Powell*, "it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him" (*Kirby v Illinois*, 406 US 682, 688, plurality opn of STEWART, J.). The right has been held to attach at arraignment (*Powell v Alabama*, *supra*; see *White v Maryland*, 373 US 59; *Hamilton v Alabama*, 368 US 52), at a postindictment lineup (*United States v Wade*, 388 US 218), at a preliminary hearing after arrest but before indictment (*Coleman v Alabama*, 399 US 1),

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Appellate Division, that his right to counsel under the State Constitution has been violated. Therefore, this Court has no occasion to consider the application of the State Constitution to defendant's situation.

at a preindictment lineup where defendant's presence was directed by court order (*People v Coleman*, 43 NY2d 222; *People v Banks*, 53 NY2d 819), and when an accusatory instrument has been filed (*People v Blake*, 35 NY2d 331). The right has been held not to apply to the postarrest, preindictment taking of handwriting exemplars from an accused (*Gilbert v California*, 388 US 263).

The guiding principle behind the decisions construing the Federal constitutional right to counsel is "that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution*, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial" (*United States v Wade*, 388 US 218, 226, *supra* [emphasis added] [nn deleted]).

It logically follows, therefore, that when no stage, not even an informal one, of a prosecution has been reached, a person has no right to assistance of counsel under the Sixth Amendment. When defendant went to the authorities, they had no intention of arresting him. Indeed, defendant's lawyer was told that there was insufficient evidence to charge defendant, unless he made a statement.[2] Under these circumstances, an indigent person could not have insisted on appointment of an attorney under the authority of the Sixth Amendment. Inasmuch as defendant would have had no right to insist that a lawyer be provided for him when he talked to the authorities, he should not be rewarded by a suppression order merely because he chose to bring a lawyer who proved valueless.[3]

Contrary to the dissent's assertion, it is not irrational to draw a line at the commencement of criminal proceedings. It bears emphasis that this line does not blindly decree that the Sixth Amendment right to counsel begins at the courthouse

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[2] In light of the indisputably noncustodial setting in which defendant's statements were made, *Miranda v Arizona* (384 US 436) and its progeny are not implicated.

[3] The right to effective assistance of counsel can be no broader than the right to counsel on which it is based.

door. From *Powell* down through the most recent decisions, the courts have remained cognizant of the realities of criminal prosecutions. Yet, all prosecutions must be deemed to start at some time. Unless the Constitution is read to require counsel for *all* persons—innocent or guilty—at the moment when any crime is committed, a line must be drawn at some later point. The commencement of criminal prosecution is the logical choice. Indeed, before commencement of prosecution, neither law enforcement officials nor the courts have any reason to be aware of the ineffectiveness of a person's lawyer, or any obligation to remedy such ineffectiveness. Moreover, before a criminal prosecution has begun, the State has no means of ensuring that a person has "the guiding hand of counsel at every step in the proceedings against him" (*Powell v Alabama*, 287 US 45, 69, *supra*).

People v Smith (59 NY2d 156) does not stand for a contrary proposition. In *Smith*, the defendant alleged that his lawyer provided ineffective assistance by advising him to speak to authorities at a meeting set up with [t]he lawyer's agreement. The meeting was arranged in connection with a prosecution in Schenectady County, on which the defendant had already been indicted. Thus, with respect to the meeting, the defendant's Sixth Amendment right to counsel had attached. The statements made at this meeting were later used at his trial on other charges in Albany County. The defendant sought suppression on the ground that he was denied effective assistance of counsel at the meeting with Schenectady County officials. Therefore, the fact that the alleged ineffective assistance occurred before criminal proceedings had begun in Albany County was not germane. The defendant's right to effective assistance had already attached by virtue of the Schenectady County indictment. Thus, in *Smith*, this court did not construe the Sixth Amendment as applying to a lawyer's actions before commencement of any criminal prosecution.

One final point merits mention. There is no indication in the record that the ineffectiveness of defendant's lawyer was in any way induced, encouraged, or abetted by the police or

District Attorney. The authorities were frank and complete in the information they provided to the attorney. The lawyer's failure to diligently protect his client's interests can be laid at no one else's doorstep.

In conclusion, defendant's statements were induced by the faulty advice of his lawyer, but it does not follow that they must be suppressed. Defendant's right to effective assistance of counsel under the Sixth Amendment had not attached, because criminal proceedings against him had not commenced.

Accordingly, the order of the Appellate Division should be affirmed.

JONES, J. (dissenting). In this case of first impression, I cannot agree that, for no reason other than that it occurred prior to the commencement of the criminal action, this defendant has no constitutional right to relief for what unquestionably was gross ineffective assistance of counsel which may well lead to his conviction. The factual circumstances of the case are detailed in the majority opinion. Both courts below, the People in our court, and the majority do not dispute that the conduct of defendant's retained counsel constituted such ineffective representation as to call for judicial remedy had it occurred after the formal initiation of criminal proceedings.

The majority mistakenly equates a defendant's constitutional right to effective representation by counsel with his right to be free from impairment of his right to counsel by the police or the prosecutor. The cases on which the majority relies all involve issues in the latter category—police or prosecutorial interference with a defendant's constitutional right to counsel; none addresses the constitutional right of a defendant to effective assistance of counsel, wholly independent of any activity on the part of the People. There can be no doubt that a defendant's right to be free from police and prosecutorial interference arises at the stage identified in the majority opinion. That circumstance, however, is not determinative of the stage at which a defendant's right to effective assis-

tance of counsel arises. Two quite different aspects of the right guaranteed by the Sixth Amendment are involved; that both are sometimes imprecisely referred to under the general rubric of a "right to counsel" should not be permitted to obscure the essential differences between the two.

It is acknowledged that the constitutional right to representation by counsel is the right to representation by effective counsel (*Cuyler v Sullivan*, 446 US 335, 344; *McMann v Richardson*, 397 US 759, 771, n 14; *People v Baldi*, 54 NY2d 137), and that the constitutional right to effective assistance of counsel extends to retained as well as assigned counsel. In *Cuyler v Sullivan* (446 US 335, *supra*), the Supreme Court of the United States considered the nature of the constitutional right to counsel and whether it extended to retained counsel. As to the latter issue it wrote: "A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." (*Cuyler v Sullivan*, 446 US 335, 344-345, *supra* [nn omitted]). We have similarly rejected arguments based on a distinction between retained and assigned counsel (*People v Aiken*, 45 NY2d 394, 400-401).

In addressing the broader issue of the nature of the constitutional right to be represented by counsel, Justice LEWIS F. POWELL, JR., writing for a unanimous court in *Cuyler*, recognized that the constitutional right to counsel is implicated

because it is State action that leads to a defendant's ultimate conviction, whether in consequence of a trial or a plea, and held "that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment". (446 US, p 344.)[1] Nothing in the opinion suggests that the right to effective assistance arises only after criminal proceedings have been commenced. Nor has any court heretofore so held. To the contrary, as recently as in *People v Smith* (59 NY2d 156) our court entertained and after careful consideration rejected contentions that the defendant's conviction in Albany County Court should be reversed because of ineffective assistance of retained counsel prior to the institution of any charges in Albany County.[2] In that case, as in the present, the claimed ineffective representation was the attorney's advice to the defendant to give statements to law enforcement authorities.

On principle a line of demarcation, as to ineffective assistance of counsel, fixed at the initiation of the criminal action makes no sense other than that it happens to be the critical point when it is claimed that activity on the part of the police deprived the defendant of his constitutional right to the presence of counsel. Nothing can be envisioned which could be more disastrous than, as here, such incompetence of representation, when the defendant was no more than a suspect and no criminal proceeding had even been commenced, as all but to assure his conviction. The panoply of constitutional protections to which defendant is entitled during the investigatory stage and later in the prosecutorial stage, both pretrial

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[1] In the present case adjudication with respect to deprivation of defendant's right to effective assistance of counsel must be made at a preliminary stage of the criminal action. It remains later to be determined whether defendant will be convicted and if so whether in consequence of a trial or a plea.

[2] The asserted ineffective assistance of counsel with respect to what later became the Albany County charges occurred during negotiations for disposition of charges for which defendant had been indicted in Schenectady County.

and at trial, may have been effectively frustrated. If, as the Supreme Court and this court have recognized, a defendant is entitled to competent representation by retained counsel, once counsel has been engaged such right must extend to representation at any stage of the events where incompetency may contribute significantly to his ultimate conviction.

The reasons advanced at the Appellate Division for holding that remedy is to be given only for ineffective assistance of counsel which occurs after a criminal proceeding has been commenced are unpersuasive. That court appears mistakenly to have concluded that a defendant's right to relief in consequence of ineffective assistance of counsel is somehow predicated on a failure of the court or of the prosecutor at the time to have protected him from the incompetence of his attorney.[3] Reference is made to the fact that "cases which examine the effectiveness of counsel involve situations in which the State, usually through its Judges, has failed in its duty to oversee the criminal process and to discern and prevent ineffective representation" (85 AD2d 245, 257), that the standard for determining ineffective assistance is based on "the assumption that Judges on the pretrial or trial level will police the competence of lawyers practicing before them", that "[t]his factor of judicial involvement is not present in a case such as this", and that it cannot "be argued that the District Attorney had an obligation to assess the competency of counsel's advice" and that even if such obligation be assumed in an extreme case, "in this case the District Attorney did not know that Heller was giving incompetent advice" (p 258). Although it is true that the court, and perhaps the prosecutor in extreme instances, has the obligation to protect the defendant from representation by his counsel which is perceived at the time to be incompetent (see *People v Medina*, 44 NY2d 199, 207), the constitutional right to representation by competent counsel is self-standing, to be protected independent of misconduct on the part of the People. Determination of the merit of

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[3] The majority appears to have adopted this rationale in part (p. 562).

the defendant's claim is made on review by an appellate court and depends on the character and circumstances of the particular representation, unrelated to whether the trial court erred in failing to perceive the incompetence or to remedy it if perceived. The application for judicial remedy in this case is not grounded on any claim of default or error on the part of the court or the prosecutor.

It becomes apparent that opportunity for judicial oversight is not the basis for granting relief when it is observed that relief is granted after a criminal proceeding has been commenced if there has been unacceptable incompetence in the pretrial stages (see, e.g., *People v Smith*, 59 NY2d 156, *supra*) or prior to plea (see, e.g., *Tollett v Henderson*, 411 US 258, 266-268; *McMann v Richardson*, 397 US 759, 768-771, *supra*) notwithstanding that in such instances there has been no opportunity or occasion for either the court or the prosecutor to know at the time of such incompetence.[4] Thus, in my view the Appellate Division was in error in concluding that defendant was entitled to no relief because "the alleged incompetence occurred at a time where there was no opportunity or possibility of contemporaneous judicial intervention" (p 259).

Because I perceive no sound reason for holding that the right to effective assistance of counsel arises only with the commencement of judicial proceedings and, on the contrary, am of the opinion that to draw such a line of demarcation not only is irrational in view of the nature and substance of the

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[4] To suggest, as the Appellate Division appears to (85 AD2d at p 257) that prior to the commencement of judicial proceedings the obligation of the authorities to refrain from questioning a suspect outside the presence of his attorney is discharged by the mere presence of an attorney, although accurate, is immaterial; that proposition again refers only to deprivation of a defendant's constitutional rights by the police. The remedy for ineffective assistance of counsel at any stage of the proceedings, by sharp distinction, is predicated on the fact of ineffective assistance, not on the failure of the court or the People to have detected it.

constitutional right to be represented by counsel but operates to deny defendant his constitutional right, I would reverse the order of the Appellate Division and, accepting the determination of both courts below that the representation in this instance was indeed ineffective, remit the case to the Appellate Division to determine the appropriate remedy to be granted defendant in the circumstances.

Judges JASEN, WACHTLER and SIMONS concur with Chief Judge COOKE; Judge JONES dissents and votes to reverse in a separate opinion in which Judge MEYER concurs.

Order affirmed.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

—v.—

ANGEL CLAUDIO and RANDOLFO MALDONADO,

Respondents.

Second Department, March 15, 1982

SUMMARY

APPEAL from so much of an order of the Supreme Court (KENNETH N. BROWNE, J.), entered May 14, 1981 in Queens County, as granted motions to suppress certain statements.

APPEARANCES OF COUNSEL

John J. Santucci, District Attorney (*Joseph Fisch*, *Joseph J. Hester*, *Deborah Carlin Stevens*, *Barbara H.D. Goldberg* and *Barry A. Schwartz* of counsel), for appellant.

Albert A. Gaudelli for Angel Claudio, respondent.

Marvyn M. Kornberg for Randolfo Maldonado, respondent.

OPINION OF THE COURT

WEINSTEIN, J.

[1] Several issues with significant constitutional ramifications are raised by this appeal. The primary issue is whether

a defendant's confession to law enforcement personnel made prior to the initiation of formal judicial proceedings should be suppressed because it was the result of incompetent advice given by an attorney whom the defendant retained. We are of the opinion that where the law enforcement personnel did nothing to persuade the attorney to give the advice, the confession should not be suppressed.

A. FACTS

I

At approximately 4:10 A.M. on May 15, 1980, in Queens, New York, Steven Zweikert was murdered in the course of a robbery committed while he was returning home from a high school prom. On May 19, 1980, as a result of an anonymous tip, police investigating the killing went to the home of defendant Claudio and requested that he come to the precinct for questioning. At the precinct he told Detective Owen Kelly that he was on the stoop of his building on the night of the robbery/murder, and went to bed at about midnight. Claudio permitted a photograph to be taken of him, and then returned home with his stepmother.

On May 21, 1980, officers were informed that an individual named Andrew Boyle had information about the killing. When contacted that evening, Boyle told the police that at about 6:00 p.m. on May 14 he had entered into a 1974 green Mustang driven by "Buck". In the back seat was a male Hispanic whom he had never met before. As they drove around, Boyle noticed that the person in the back seat was playing around with a gun. Boyle claimed that he got out of the car at about 8:00 P.M. and left. An officer then showed Boyle about six or seven loose photographs, and he selected Claudio's as that of the individual in the back seat of the car.

On the evening Boyle was questioned, Claudio, who was 16 years of age at the time, saw the name of the law firm of Heller and Heller in a telephone book. With the assistance of his cousin, David Erasquine, Claudio called the law firm and left a message. Shortly

thereafter, attorney Mark Heller returned Claudio's call, and arrangements were made to meet the following morning at the Brooklyn Criminal Court, where Heller had some business.

Heller, Claudio and Erasquine met the next morning, and Claudio retained Heller to represent him with respect to the Zweikert matter. At a certain point during their conversation, a decision was reached that Claudio would surrender to the Queens County District Attorney. How that decision was reached is a matter of some dispute. According to Heller's testimony at the suppression hearing, Claudio insisted on that course of action, despite Heller's advice that he take some time to think about it. Heller stated that Claudio wanted to come forward and tell the truth because he was extremely troubled by what had happened and could not eat or sleep. On the other hand, Claudio testified that he surrendered because Heller told him to, and he thought that Heller, as an attorney, knew best. Claudio stated that at no time did Heller discuss with him the possible charges, including felony murder, that could arise out of the incident. Nor did Heller advise him of possible defenses or discuss mandatory sentences. In fact, according to Claudio, Heller told him that if he co-operated with the authorities he "might not even have to go to jail". This is disputed by Heller, who stated that he fully informed Claudio of the consequences of surrendering.

In any event, they arrived at the District Attorney's office at about 1:50 P.M. on May 22. Heller left Claudio and his cousin alone and for the next or so spoke with various Assistant District Attorneys, as well as with District Attorney Santucci. Heller told the District Attorney that according to Claudio the shooting was an accident, and that he was remorseful and wished to surrender. Heller attempted to exact a promise that the District Attorney would accept a guilty plea to a charge less than felony murder. Heller was categorically told by Santucci that there would be no plea bargaining in the case. Upon returning to his client, Heller did not tell Claudio that there would be no deal, but only that he was still negotiating.

At a certain point, Assistant District Attorney Del Vecchio came to Heller with a tape recorder and asked that Claudio give a statement. At first Heller refused, saying that they should "[j]ust book him and arraign him". Del Vecchio told Heller, "I want to talk to him, we can't book him and arraign him on nothing". Indeed, according to Santucci, Del Vecchio and other Assistant District Attorneys who testified at the suppression hearing, the prosecutors knew that without a statement they lacked sufficient evidence to charge Claudio with the Zweikert murder. Heller denied being told this, but he did admit knowing that Claudio had been questioned two days earlier, without having been arrested, and he also admitted that he never ascertained whether Claudio was wanted by the police.

Heller then left Del Vecchio and spoke with his client. When he returned, he told Del Vecchio that Claudio wanted to make a statement. As with the initial decision to surrender, the circumstances of this decision are in dispute. Heller testified that he did not want Claudio to give a statement, but that the latter insisted on doing so. Heller claimed to have outlined the alternatives for Claudio but declined to give specific advice, leaving it up to his client to make a decision. Heller acknowledged that he did not tell the District Attorney not to question Claudio. Claudio's testimony was that he consented to make a statement on Heller's advice.

The confession was made with Heller present and after *Miranda* warnings had been given to Claudio. Answers given by Claudio, as evidenced by a tape of the confession, suggest that it was Claudio's decision to surrender and to confess; according to Claudio, however, he had answered affirmatively to these questions because Heller had told him to do so. Whether Criminal Term accepted this explanation is unclear, but it is clear that Criminal Term concluded that Heller did have at least some control over Claudio as to the statement, and could have prevented the confession from being made if he had chosen to.

After the confession, Claudio was told that he was going to be arrested. Up to that point, he had not been handcuffed. Claudio testified that, when told that he was under arrest and was going to jail, he was surprised and angry, and that he felt Heller had "fooled" him.

II

Shortly thereafter, District Attorney Santucci held a press conference in which Heller participated. Heller also made statements to the press subsequent to the press conference. Among other things, Heller made a plea through the media to the other persons involved in the Zweikert robbery and homicide to surrender themselves. According to Santucci, he was asked by Heller to join in this plea; he flatly refused.

Defendant Maldonado saw and heard on television Heller's appeal to surrender. On May 24, with the assistance of Claudio's aunt, Maldonado contacted Heller by telephone and discussed surrendering. Maldonado testified that Heller told him to wait until the weekend was over, that he, Heller, would turn him in on the following Tuesday, and that if anything happened in the meantime, he should co-operate with the police. Heller disputes this account; he testified that he told Maldonado that he would not give any advice over the telephone. There is no indication in the record that Heller was given Maldonado's name, or that they discussed the terms of any representation. Subsequent to the telephone conversation, Heller called Detective Kelly and informed him that he might have someone to surrender and would get back in touch.

On May 26, Detective McKnight received an anonymous telephone call. The caller said: "I am calling about the student killing, he's waiting to give up at 359 Crescent St. He's waiting for you." He gave the person's name as "Randy". Thereupon, four officers, including two detectives, went to an apartment at the location. Several persons were in the apartment, including Mrs. Freida Maldonado and about six other

relatives of defendant Maldonado, three of whom were children.

The officers were invited into the home, and Mrs. Maldonado called her son inside to join them. According to the officers, Maldonado was told that they were investigating the Zweikert homicide and that they were told he might have some information which would help them. At that point, Maldonado stated: "I was with Angel that night, it was an accident."

Detective Kelly then took Maldonado into a bedroom and, with his mother present, told him he was going to be arrested and questioned further. According to Kelly, prior to questioning Maldonado in the bedroom, he gave him his *Miranda* warnings. This is disputed by Maldonado's mother and aunt, who stated that it was only after Maldonado finished making further admissions that the *Miranda* warning were given. According to their testimony, when Maldonado was told he had a right to remain silent, he refused to say anything more.

Subsequently, in a police car on the way to the precinct, Maldonado was questioned again and made additional statements. Maldonado testified that in the police car he told the officers he had spoken to a lawyer. Detective Kelly asked him who the lawyer was. When Maldonado hesitated, Kelly asked him if it was Heller. Maldonado said yes.

Assistant District Attorney Del Vecchio arrived at the precinct shortly after Maldonado was brought in. Heller had been contacted, and when he arrived, Del Vecchio asked him if he represented Maldonado. Heller asked to speak to Maldonado first. When the attorney returned from speaking to Maldonado, Del Vecchio asked him whether his representation of Maldonado had just begun when they spoke to each other in the precinct. Heller said it had.

Both defendants were indicted for murder in the second degree (felony murder), attempted robbery in the first degree, and criminal possession of a weapon in the second degree. Following their indictment, both defendants filed omnibus motions, seeking, *inter alia*, suppression of all statements made by them. Criminal Term ordered a hearing, and after

receiving extensive testimony, granted the motions insofar as they were to suppress. The People appeal.

B. THE LAW: DEFENDANT CLAUDIO

We begin with the assumption that Heller advised Claudio to surrender and confess, and that Claudio's actions were based upon that advice. Whether Claudio insisted on confessing, irrespective of the consequences, or whether he did so at Heller's prompting, is a question of credibility. Criminal Term found that Claudio was acting on Heller's advice, and that Heller did have at least some control over Claudio and the situation. Criminal Term's conclusions are supported in the record and therefore should not be disturbed on appeal (*see People v Curatolo*, 76 A.D.2d 524, 528). We note in this regard that the court credited Del Vecchio's testimony that he told Heller that they lacked sufficient evidence, without a confession, to arrest Claudio. Heller himself admitted that he never made an inquiry as to whether Claudio was wanted by the police. Given these findings, and the fact that Heller was told that there would be no plea offer, it must be concluded that Heller failed to fulfill his responsibility to protect his client's interest diligently and competently. It is significant that the People, on appeal, have not argued to the contrary.

The issue, however, is whether Heller's conduct deprived Claudio of his constitutional rights.[1]

I

Criminal Term found that Heller's representation of Claudio was ineffective, resulting "in a clear surrender of the defendant's constitutional privilege". In the court's opinion,

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[1] Heller was relieved as Maldonado's attorney on June 3, 1980 by the Criminal Court in Queens County, because of the conflict of interest in representing both defendants. Heller was later discharged as Claudio's lawyer, and both defendants were assigned counsel pursuant to article 18-B of the County Law.

it was Claudio's right to effective assistance of counsel under the Sixth Amendment of the United States Constitution that was violated. Further, the court found that Heller's incompetent assistance tainted Claudio's confession in that it was made consequent to an uninformed waiver of his Fifth Amendment right against self incrimination.

In our view, Criminal Term's analysis incorrectly presupposes that Claudio's Sixth Amendment right to counsel had attached at or prior to the time he made his confession. The right to counsel under the Sixth Amendment does not attach every time a person becomes involved with law enforcement authorities. The trigger for the Sixth Amendment right to counsel is the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" (*Kirby v Illinois*, 406 US 682, 689).

In this case, no judicial proceedings had commenced. Claudio had not been arraigned, and no criminal complaint had been filed (cf. *Brewer v Williams*, 430 US 387). In fact, he had not even been arrested; indeed, as Assistant District Attorney Del Vecchio told Heller, without Claudio's confession, there was insufficient evidence to "book him". Accordingly, Claudio's Sixth Amendment right to counsel had not yet attached, and therefore any argument premised on the Sixth Amendment must fail (see *United States v Zazzara*, 626 F2d 135; *Brown v United States*, 551 F2d 619).

Aside from the Sixth Amendment, there is a right to counsel which arises out of the Fifth Amendment right against self incrimination. "[T]he right to have counsel present at [a custodial] interrogation is indispensable to the protection of the Fifth Amendment privilege" against self incrimination (*Miranda v Arizona*, 384 US 436, 469). This is not a Sixth Amendment right to counsel, since, as noted above, that right is triggered with the advent of judicial proceedings. Rather, it is, in effect, a right to counsel found necessary " 'to guarantee full effectuation of the privilege against self-incrimination' " (*Kirby v Illinois*, *supra*, p 689, quoting from *Johnson*

v New Jersey, 384 US 719, 729). The distinction between the right to counsel under the two amendments can be critical, as the Supreme Court recently noted (see *Rhode Island v Innis*, 446 US 291, 300, n 4; cf. *Brewer v Williams*, *supra*).

Any claim by Claudio that his Fifth Amendment right to counsel under *Miranda* was violated must turn on whether his confession was given while he was undergoing custodial interrogation. If Claudio was not in custody when he made the confession, the rule of *Miranda*, and thus his right to counsel under *Miranda*, has no application (see *Bechwith v United States*, 425 US 341; *United States v Zazzara*, *supra*). The test in determining the existence of custody is an objective one: "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position" (*People v Yukl*, 25 NY2d 585, 589). Absent some obvious, tangible constraint, such as handcuffs or drawn guns, or absent explicit language from law enforcement personnel indicating restraint, none of which are present here, the courts have looked at four factors: (1) was there probable cause for an arrest; (2) what was the subjective intent of the interrogation; (3) what was the suspect's subjective belief as to his freedom; and (4) was the investigation focused on the suspect (see *United States v Micieli*, 594 F2d 102).

In this case, there was no probable cause to arrest prior to Claudio's statement. The intent of the interrogators is clear, for without a statement Claudio would not be booked or arraigned. As to the defendant's state of mind, it might be argued that any person, innocent or not, who turns himself in in the connection with murder of which he knows he is suspected, would reasonably believe that he would immediately be placed in custody. However, Claudio himself testified that he was surprised and angry when he was told that he was under arrest and would have to go to jail. As regards the last factor, Claudio was indeed the focus of the investigation. However, that factor is insufficient by itself to support a finding of custody. Accordingly, we conclude that Claudio was not in custody and therefore his contention, insofar as it is

premised on the Fifth Amendment, fails. In sum, then, we find that Claudio was not denied effective counsel under the United States Constitution (see *People v McKie*, 25 NY2d 19).

II

While Claudio cannot complain about ineffective counsel on Federal constitutional grounds, a line of argument still open to him is that based on the New York State Constitution (NY Const, art I, § 6). As the Court of Appeals has frequently noted, there are two distinct lines of cases which consider the circumstances in which the right to counsel has indelibly attached under our State Constitution (see *People v Kazmarick*, 52 NY2d 322; *People v. Cunningham*, 49 NY2d 203; *People v Settles*, 46 NY2d 154).

The first began with cases such as *People v DiBiasi* (7 NY2d 544) and *People v Meyer* (11 NY2d 162), and was recently manifested in *People v Samuels* (49 NY2d 218). These cases hold that the right to counsel arises with the commencement of formal adversary proceedings, such as an arraignment, indictment, or the filing of a felony complaint. This runs roughly parallel to the Federal cases interpreting the Sixth Amendment right to counsel, and are also founded on the principle that when formal judicial proceedings commence, "the character of the police function shifts from investigatory to accusatory" and the assistance of counsel becomes "indispensable" (see *People v Settles*, *supra*, p 163; *People v Kazmarick*, *supra*, pp 326-327; cf. *Moore v Illinois*, 434 US 220, 228; *Kirby v Illinois*, *supra*, pp 689-690).

The second line of cases began with *People v Donovan* (13 NY2d 148). As was noted in *People v Settles* (*supra*, p 162), this line grew out of the need to protect suspects from pre-arraignment and preindictment police abuse. Thus, the court in *Donovan*, looking to the privilege against self incrimination and the right to due process (NY Const, art I, § 6), held that a person in custody and represented by an attorney can-

not waive his rights outside of the presence of his attorney, despite the fact that no judicial proceedings had taken place.

The line of cases beginning with *People v Donovan* (*supra*) traverses roughly the same ground as those premised on *Escobedo v Illinois* (378 US 478), and *Miranda v Arizona* (*supra*) and, in fact, the Supreme Court in *Escobedo* relied on *Donovon* (*Escobedo v Illinois*, *supra*, pp 486-487). As with *Miranda*, the *Donovan* cases are predicated on the principle of "fundamental fairness, the belief that an attorney's presence is the most effective means of minimizing the disadvantage of the accused person in custody, and the recognition that an unrepresented defendant in custody who has requested an attorney has indicated his own belief that without legal advice he is not competent to deal with those in whose custody he is being held" (*People v Kazmarick*, *supra*, p 327; cf. *Miranda v Arizona*, *supra*, pp 469-470; see *People v Cunningham*, *supra*; *Edwards v Arizona*, 451 US 477).

The development of the Donovan concept continued in *People v Sanchez* (15 NY2d 387), *People v Arthur* (22 NY2d 325) and *People v Hobson* 39 NY2d 479), and was further extended in *People v Rogers* (48 NY2d 167) and *People v Cunningham* (*supra*). A very recent decision, representing perhaps the outer limit of the doctrine, is *People v Skinner* (52 NY2d 24). There, it was held that a person not yet in custody may not be questioned outside of the presence of his attorney about a matter under investigation when the interrogators know that he has retained an attorney to represent him in relation to the very subject being investigated. In *People v Skinner* (*supra*) the defendant had been subject to repeated police contacts and was clearly a suspect. As a result of being questioned, he hired a lawyer. By so doing, he "indicated that he felt himself unable to deal with the authorities without legal assistance" and "activated his constitutional right to interpose an attorney between himself and the overwhelming power of the State" (*People v Skinner*, *supra*, p 32). The court ruled that after the police were made aware that the defendant had retained counsel, they could not question him outside of

the presence of counsel without a waiver of counsel made in counsel's presence.[2]

Applying *People v Skinner* (*supra*) to the facts at bar, it is clear that Claudio's right to counsel under our State Constitution had attached prior to his confession. He had been questioned by the police in relation to the Zweikert investigation. As a result, he sought the aid of counsel, and retained Heller. The authorities were obviously made aware of Heller's representation when the latter appeared at the District Attorney's office in order to surrender Claudio. The holding of *People v Skinner* (*supra*) is, therefore, applicable (cf. *People v Marrero*, 51 NY2d 56).

III

Heller was present when Claudio waived his right to remain silent and when he was questioned. In these respects, Claudio's rights under *People v Skinner* (*supra*) were scrupulously honored. The question remains, however, whether the fact that Heller's advice was incompetent somehow violated Claudio's right to counsel.

It has often been stated that the right to counsel under the Sixth Amendment is the right to effective counsel (*Cuyler v Sullivan*, 446 US 335, 344; *McMann v Richardson*, 397 US 759, 771, n 14). Similarly, the right to counsel under the New York Constitution as interpreted in the line of cases which measures that right as of the commencement of formal adversary proceedings, includes the right to competent counsel (*People v Baldi*, 54 NY2d 137). To our knowledge, however, no court has held that a defendant was deprived of his constitutional right to counsel by his attorney's incompetence

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[2] The holding in *People v Skinner*, (52 NY2d 24) was presaged by our holding in *People v Curatolo*, (76 AD2d 524). For a recent application of *Skinner* where, as in *People v. Cunningham*, (49 NY2d 203), the suspect requested counsel (see *People v Johnson*, (79 AD2d 201).

prior to the initiation of formal judicial proceedings. In that respect, this case apparently raises a question of first impression.[3]

An analysis of the question before us requires an examination of first principles. As already noted, the Sixth Amendment right to counsel, as well as its parallel State constitutional right, is triggered with the advent of judicial proceedings, because it is then that the assistance of counsel is deemed indispensable. Not only does a defendant find himself facing the prosecutorial power of the State, but he becomes "immersed in the intricacies of substantive and procedural criminal law" (*Kirby v Illinois*, *supra*, p 689). His need for adequate legal assistance at that point is clear (*Cuyler v Sullivan*, *supra*, pp 343-344). Thus, the right to counsel is broadest when judicial proceedings commence.

It is true that prior to the initiation of formal proceedings, the right to counsel may attach under the *Donovan* line of cases, and under *Skinner* (*supra*) in particular, because of the perceived need of a suspect in custody to interject an attorney between himself and the inquisitorial power of the State. But no considerations regarding the complexity of the criminal law and of judicial proceedings arise. We believe that prior to the initiation of formal proceedings the right to counsel is accordingly more limited than that arising under the Sixth Amendment.

People v Donovan (13 NY2d 148, *supra*) and its progeny require that the authorities refrain from questioning a defendant or suspect outside of the presence of his attorney, absent a waiver of his rights made in the presence of counsel. We see no reason to require, as is indeed required in instances where judicial proceedings have commenced, that the courts go beyond the presence of counsel and examine the quality of his

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[3] In *United States v Zazzara* (626 F2d 135), the Ninth Circuit Court of Appeals was able to avoid the issue, since in that case neither the defendant's Fifth nor Sixth Amendment rights had been triggered. The court did not say how it would have handled the case if the Fifth Amendment right to counsel had attached.

advice. Uniformly, cases which examine the effectiveness of counsel involve situations in which the State, usually through its Judges, has failed in its duty to oversee the criminal process and to discern and prevent ineffective representation. It is unnecessary here to retrace the well-chronicled development of the standards for competency, from the "farce and mockery" test to the "reasonable competence" standard and the "flexible framework" approach (See, e.g. *People v Baldi*, 76 AD2d 259, 278-281, revd on other grounds 54 NY2d 137, *supra*, for description of various standards and their development). It is sufficient to note that inherent in the formulation of each standard is the assumption that Judges on the pretrial or trial level will police the competence of lawyers practicing before them. This factor of judicial involvement is not present in the case such as this, where the claim of incompetence focuses on events prior to any judicial proceedings. Indeed, in *People v Tomaselli* (7 NY2d 350), the Court of Appeals held that only when ineffective counsel is brought about through judicial action or inaction will a defendant be entitled to relief.[4]

While Heller's advice may have been egregious, his actions did not occur in the context of a trial or other proceeding, wherein a Judge should have been aware of it and corrected it.

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[4] The focus in *People v Tomaselli* (7 NY2d 350) is on the need for preventive action by the trial court. A case illustrating this focus is *Lanza v New York State Joint Legis. Comm. on Govt. Operations* (3 NY2d 92), relied on in *Tomaselli*. In *Lanza*, the Court of Appeals refused to enjoin the use of a recording of a confidential conversation between a lawyer and his client. While not condoning such interference in the attorney/client relationship, the recording was not enjoined since the interference did not occur "in connection with a proceeding directed against" the client (*Lanza v New York State Joint Legis. Comm. on Govt. Operations*, *supra*, p 98). The *Lanza* holding was effectively overturned with the 1958 enactment of § 353-a of the Civil Practice Act, now included in CPLR 4503, forbidding the introduction of evidence obtained in violation of the attorney/client privilege.

Nor can it be argued that the District Attorney had an obligation to assess the competency of counsel's advice. And, even assuming a District Attorney has such an obligation in an extreme instance, in this case the District Attorney did not know that Heller was giving incompetent advice. Heller told District Attorney Santucci and his assistants that Claudio was remorseful and insisted in turning himself in and on making a statement. Claudio himself, in his confession, indicated that it was his idea. If a suspect insists on confessing, a defense attorney is not incompetent because he fails to stop him. The attorney should, of course, advise his client of the consequences, and take measures to limit his client's exposure, if possible. But from what the District Attorney knew, that is exactly what Heller was attempting to do. As the Supreme Court said in *Miranda v Arizona* (384 US 436, 478, *supra*) "[t]here is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime", and the same holds true when that person is accompanied by an attorney (see *People v Kaye*, 25 NY2d 139).

It is incumbent on a court to prevent incompetence (*People v Medina*, 44 NY2d 199, 207).[5] A well-placed admonition to counsel might be sufficient, whether before or during trial. In an extreme case of incompetence, the court may even go so far as to disqualify an attorney from further representation (see *United States v Rogers*, 471 F Supp 847, *affd sub nom. United States v Raife*, 607 F2d 1000). However, in a case such as this case, where the alleged incompetence occurred at a time where there was no opportunity or possibility of contemporaneous judicial intervention, the courts will not look

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[5] A 1975 survey conducted by the American Bar Association revealed that of 1,422 Judges surveyed, 96% of them had responded to incompetence by giving "instruction or advice" in chambers, 77% had "rebuked" counsel in chambers, and a majority had given "instruction or advice" in open court (Maddi, Trial Advocacy Competence: The Judicial Perspective, 1978 Amer Bar Foundation Research J, 105, 129).

back in an attempt to measure the competency of the advice given to an uncharged suspect by his retained counsel.

These principles are, in our view, fully consistent with an appropriate balance between an individual's rights and the responsibilities of the State. Whether or not advice given by an attorney is competent is often an extremely difficult question. A Judge should question an attorney's performance with caution, lest he interfere with Counsel's legitimate strategy and intrude on the attorney/client relationship (see *United States v Decoster*, 624 F2d 196, 208). Determining competence is a "judgment call", requiring expertise normally beyond the ken of lay persons. Yet the defendant argues that law enforcement personnel, without judicial training, cannot take a confession when made on the advice of incompetent counsel. Thus, any time an individual gives a confession in the presence of counsel, defendant would have us hold that the interrogator has a burden to inquire as to the competency of counsel and his advice to his client. Not only does this pose an unjustifiable intrusion into the attorney/client relationship, it places an impossible burden on the law enforcement officer. How is the law enforcement officer to make such a judgment (cf. *People v Servidio*, 77 AD2d 191, affd 54 NY2d 951)?

In this case, the interrogators were attorneys for the State and not police officers. That distinction does not alter the result, since there is a need to formulate a useable and uniform rule. Interrogation by law enforcement personnel need not be predicated on a determination that the suspect has received adequate and effective advice.[6] Making a distinction within this rule between interrogators from a District Attorney's office and those from a police department would only discourage the practice of using an Assistant District

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[6] Whether more is required of law enforcement personnel conducting an interrogation after the commencement of formal judicial proceedings need not be resolved in this case (cf. *United States v Mohabir*, 624 F2d 1140).

Attorney to take a confession. That practice should, to the contrary, be encouraged since it does help protect an individual's rights under the law. Furthermore, such a distinction would be unworkable and unfair; an experienced policeman may be far more aware of a suspect's legal rights than an inexperienced young Assistant District Attorney. Finally, and most importantly, the question of effective representation is best left to judicial expertise, and not to the discretion of law enforcement personnel, no matter how well trained.

In sum, we are of the view that Claudio's constitutional right to counsel was not violated by the incompetency of Heller's advice. The focus in a case such as this, where the right to counsel arises because a suspect has chosen to place an attorney between himself and the State, should be on whether the authorities have honored the suspect's choice by ceasing all questioning in the absence of counsel, rather than on whether the attorney gave good advice. The converse would only penalize the People for that which could not reasonably have been prevented. The job of insuring effective representation, for both policy and practical reasons, is best left to the courts and not to law enforcement officials. By so holding, we are acknowledging a factor inherent in all the formulations for determining effectiveness: the need to encourage judicial intervention in cases of incompetent representation (see Schwarzer, *Dealing with Incompetent Counsel—the Trial Judge's Roles*, 93 Harv L Rev 633; see, e.g., *People v Macerola*, 47 NY2d 257; *People v Wilson*, 15 NY2d 634).[7]

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[7] We express no opinion on whether the result would be different if the interrogators knew that Claudio was acting pursuant to bad advice. As noted above, the District Attorney did not know that Heller was giving incompetent advice and that Claudio was simply following the advice.

C. THE LAW: DEFENDANT MALDONADO

Criminal Term held that when Maldonado was questioned in his living room, he was in custody. The court's conclusion was predicated on defense testimony to the effect that the four officers present in the room were talking to Maldonado at the same time, that they "demanded" information, and that "some of the nieces started to cry during the twelve–fifteen minutes of questioning". His initial statement, that "I was with Angel that night, it was an accident", was thus suppressed as being made without prior Miranda warnings during custodial interrogation.

Criminal Term also credited the defense witnesses who testified that *Miranda* rights were given to Maldonado only after he made further statements in the bedroom, whereupon he refused to say anything more. In light of this finding, the court suppressed these statements, as well as those made subsequently in the police car.

On the record before us we conclude that the proof established that the interrogation in the living room was not custodial. Under the objective test for custody (*People v Yukl*, 25 NY2d 585, *supra*), "the questioning of a defendant in her own home by police officers is not, without more, sufficient to conclude that the interrogation was custodial" (*People v Paulin*, 25 NY2d 445, 449).

There is no evidence that Maldonado was restrained in any significant way. He was not under arrest (cf. *People v Rodney P.*, 21 NY2d 1). The fact that the questioning lasted 12 to 15 minutes is insufficient; courts have found that questioning of a far greater duration was noncustodial (see *People v. Yukl*, *supra*). The questioning occurred in Maldonado's own home, in the presence of his family. He was not isolated (cf. *People v Mason*, 59 AD2d 580 [defendant questioned alone in police car outside his home; court found no custody]). The fact that there were four officers present was not inherently coercive or an indication that Maldonado was under restraint (cf. *People v. Williamson*, 71 AD2d 632, affd 51 NY2d 801; *People v Liccione*, 63 AD2d 305 [questioning by three offi-

cers noncustodial]). The officers never accused him or threatened him; at most, they "demanded" information. The fact that some of Maldonado's nieces started crying is not indicative of anything more than that they were upset.

Absent objective evidence of restraint, we must look at other factors, as we did with respect to Claudio. The record is silent as to Maldonado's subjective belief. The police officers believed an arrest was a possibility when they went to the apartment. However, they had no idea for whom they were looking; all they had was a name, "Randy", given them by an anonymous caller, and an address. They had no probable cause or even a reasonable suspicion that Maldonado was involved in the [Z]weikert killing. According to an officer's testimony, it was only after Maldonado made his initial statement that he was placed under arrest.

[2] Under these circumstances, we conclude that Maldonado was not undergoing custodial interrogation when he made the statement in the living room. Accordingly, the lack of prior *Miranda* warnings does not preclude the statement's admissibility. Nor was there intimidation present such as to render the statement involuntary in the traditional sense of the term. The statement was "the product of an essentially free and unconstrained choice" (*Culombe v Connecticut*, 367 US 568, 602). The statement is therefore admissible.

Maldonado argues that an alternate ground for suppressing all of his statements, including the admission in the living room, is that he had been improperly advised by Heller on the telephone to co-operate with the police. In one respect, Maldonado's argument goes beyond that posited by defendant Claudio. Contrary to Maldonado's contention, there is no indication in the record that Heller was acting as the District Attorney's agent in obtaining Claudio's confession. On the other hand, Heller's appearance with District Attorney Santucci at the press conference and Heller's plea to the others involved in the crime to turn themselves in does tend to indicate that Heller was advancing conflicting interests in making such a plea. If in fact Heller and Maldonado had

entered into an attorney/client relationship prior to the latter's arrest, and as Criminal Term found, Heller told Maldonado to co-operate with the police, it may well be that the living room admission would have to be suppressed. The question would be whether Heller's representation of Maldonado was so imbued with the District Attorney's involvement as to lead to the conclusion that Heller was acting jointly with, or as an agent of, the District Attorney's office (cf. *United States v Henry*, 447 US 264; *Massiah v United States*, 377 US 201; *People v Adler*, 50 NY2d 730). However, this issue need not be reached, as Heller did not assume representation of Maldonado until he interviewed him personally at the precinct after his arrest.

[3] It cannot be said that Heller became Maldonado's attorney during their initial telephone conversation, for there is no indication in the record that Heller was even told Maldonado's name, and discussions about any contractual agreement occurred only at the precinct. While Maldonado may have intended to retain Heller prior to his arrest, he had not done so. This is not a case where an attorney and a defendant have an ambiguous relationship, but the authorities are informed prior to questioning of the attorney's involvement (cf. *People v. Marrero*, 51 NY2d 56, *supra*). The first word the police received that Heller had spoken to Maldonado was on the ride to the police station, at which time questioning stopped. From the record, it is clear that while Maldonado may have co-operated with the police because of Heller's appeal on television and as a result of their telephone conversation, that co-operation is not tainted because of inappropriate interferences by the District Attorney's office in the attorney/client relationship. At the time Maldonado made his statements, there simply was no attorney/client relationship to be interfered with, and the statements were consequently not constitutionally infirm.[8]

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[8] We note for the record that according to Santucci, the District Attorney's office refused to join Heller in making

[4] Nonetheless, the statements made by Maldonado after his initial admission must be suppressed because of late *Miranda* warnings. After the initial admission, Maldonado was told that he was going to be arrested. Further questioning was improper absent *Miranda* warnings. Criminal Term's finding that these warnings were not given until after further questioning is solely a matter of credibility—the officer's word against the word of witnesses for Maldonado. We will not disturb that finding, and therefore the statements made in the bedroom must be suppressed.

The conversation in the police car must also be suppressed. Further warnings were not given to Maldonado, despite his election, in the bedroom, to say nothing more. The car conversation was in the same vein as the conversation in the bedroom. Since the statements made in the bedroom should be suppressed, the statements made in the car must be suppressed as being tainted under the "cat out of the bag" doctrine (see *People v Byrne*, 47 NY2d 117, 122; *People v Chapple*, 38 NY2d 112).

D. CONCLUSION

For the reasons set forth above, that part of defendant Claudio's motion which was to suppress his confession must be denied. Defendant Maldonado's motion insofar as it was to suppress is denied as to his first statement, and is otherwise granted as to his later statements.

MOLLEN, P.J., GULOTTA and THOMPSON, JJ., concur.

Order of the Supreme Court, Queens County, dated May 14, 1981, reversed insofar as appealed from, on the law, that

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the public plea to surrender, and that Heller's purpose in making the plea was to help mitigate the case against Claudio.

part of defendant Claudio's motion which was to suppress his confession is denied and that part of defendant Maldonado's motion which was to suppress certain statements is denied as to his first statement and is granted as to his later statements.